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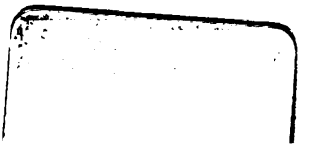

CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS

OF THE

UNITED STATES

FOR THE

EIGHTH JUDICIAL CIRCUIT.

REPORTED BY
GEO. W. M'CRARY,
THE CIRCUIT JUDGE.

VOLUME IV

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JUDGES

OF THE

CIRCUIT COURTS OF THE UNITED STATES

FOR THE

EIGHTH JUDICIAL CIRCUIT.

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HON. GEORGE W. McCRARY, Circuit Judge.

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REPORTS OF CASES ARGUED AND DETERMINED

IN THE

Circuit Courts of the United States,

FOR THE

EIGHTH JUDICIAL CIRCUIT.

In the Matter of John Brosnahan, Jr.

(Western Division, Western District of Missouri. June, 1883.)

1. Habeas Corpus — Power of Federal Courts — State Criminal Statute. — The circuit court of the United States may issue the writ of *habeas corpus* upon the application of any person who is imprisoned in violation of the constitution, or of any law or treaty of the United States, and if a person be imprisoned under a state statute which is in conflict with either, that court has power to discharge him.
2. State Statute Held Not in Violation of the Constitution of the United States. — The statute of Missouri providing for the punishment by fine and imprisonment of any person who shall manufacture "out of any oleaginous substance, or any compounds of the same, other than that produced from unadulterated milk, or cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream of the same," or who shall sell or offer for sale the same as an article of food, is not in violation of any provision of the constitution of the United States.
3. Patent Laws — Rights of Patentee. — The sole object of the patent laws is to give to the inventor a monopoly of what he has discovered. What is granted to him is the exclusive right — not the abstract right — but the right in him to the exclusion of everybody else. He is not authorized by the patent laws to manufacture and sell the patented article in violation of the laws of the state. His enjoyment of the right may be modified by the exigencies of the community to which he belongs, and regulated by laws which render it subservient to the general welfare if held subject to state control.

In the Matter of John Brosnahan, Jr.

4. PATENT — IN WHAT SENSE A CONTRACT. — A patent is a contract only as between the parties to it, namely, the United States on one side and the patentee on the other, and the rights conferred thereby can extend no further than the right granted to the patentee under the patent laws.
5. REGULATION OF COMMERCE. — The statute above mentioned is not a regulation of commerce among the several states.
6. DEPRIVATION OF LIBERTY OR PROPERTY — FOURTEENTH AMENDMENT TO THE CONSTITUTION. — The statute above named does not deprive any person of liberty or property without due process of law, within the meaning of the fourteenth amendment to the constitution.
7. HABEAS CORPUS — JURISDICTION. — The federal courts have no jurisdiction to discharge a prisoner held under a state statute, upon the ground that such statute is in violation of the constitution of the state, or in excess of the powers which the people of the state have conferred on their legislature. If it does not violate the federal constitution, the question is for the state courts.

On petition for *habeas corpus*.

Before Mr. Justice Miller and McCrary, Circuit Judge.

MILLER, *Circuit Justice*. — The prisoner in this case is brought before us by virtue of a writ of *habeas corpus* issued under the authority of this court, and directed to John W. Rucker, in whose custody the petitioner stated himself to be.

To this writ Mr. Rucker, at the time of producing the body of his prisoner, makes return that he holds him in custody by virtue of a precept to him directed as constable, by A. W. Allen, a justice of the peace of Jackson county, Missouri, and he annexes a copy of the *mittimus* as a part of his return. From this it appears that a criminal proceeding had been instituted against Brosnahan for a violation of the statute of Missouri concerning the sale of oleomargarine, and that on being arrested and brought before the justice of the peace, the latter had set the hearing or trial at some future day several months off, and had fixed a reasonable sum as bail for the prisoner's appearance at that time. The prisoner refused to give bail, whereupon the magistrate made the order committing him to custody.

The present writ of *habeas corpus* was thereupon sued out.

As the courts of the United States are of limited jurisdiction, and in ordinary cases can have no control of the courts or judicial officers of the states while engaged in enforcing their criminal laws, the counsel representing Rucker on behalf of the state deny the jurisdiction of this court in the case.

For the prisoner the jurisdiction is asserted on the following grounds:

First. That the statute of Missouri is void because the article, oleomargarine, the sale of which it forbids in Missouri, is made and sold under a patent of the United States issued to Hippolyte Mege, December 30, 1873, for a new and useful discovery under the patent laws on that subject.

Second. It is void because it impairs the obligation of the contract evidenced by that patent.

Third. It is void because it is a regulation of commerce among the several states.

Fourth. Because it deprives a man of his property without due process of law. Sec. 1, art. XIV, of the amendments to the constitution of the United States.

Fifth. Because it is without any authority in the constitution of the state of Missouri, and is outside of any legislative power whatever.

The statute thus assailed is in the following words:

"An act to prevent the manufacture and sale of oleaginous substances, or compounds of the same, in imitation of the pure dairy product.

"SECTION 1. Whoever manufactures, out of any oleaginous substances, or any compounds of the same, other than that produced from unadulterated milk, or cream from the same, any article designed to take the place of butter or cheese, produced from pure, unadulterated milk, or cream of the same, or whoever shall sell or offer for sale the same as an article of food, shall, on conviction thereof, be confined in the county jail not exceeding one year, or fined not exceed-

ing one thousand dollars, or both." Approved March 24, 1881.

The acts of congress concerning the writ of *habeas corpus* have been brought together in chapter 13 of the Revised Statutes, and are included in sections 751–766.

That which relates to the jurisdiction of the circuit courts is found in sections 751 and 753.

"SEC. 751. The supreme court and the circuit and district courts shall have power to issue writs of *habeas corpus*."

"SEC. 753. The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless when he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof, or is in custody for an act done or omitted in pursuance of the law of the United States, or of an order, process or decree of a court or judge thereof; *or is in custody in violation of the constitution, or of a law or treaty of the United States*, or being a subject or citizen of a foreign state," etc., etc.

The words italicised above, namely, "or is in custody in violation of the constitution, or of a law or treaty of the United States," confer the only power under which, in this case, jurisdiction can be exercised by the circuit court.

It is quite clear that if the Missouri statute is justly obnoxious to either of the four objections first named, it is void, and the person held for violating that statute is in custody in violation of the constitution of the United States, and the power and duty of this court to discharge him are unquestionable.

We proceed to inquire if the law is so objectionable.

First. As to the effect of the patent.

The patent is introduced in evidence, and proof is offered to show that the article sold by the prisoner, and for which sale he is prosecuted, is the article specified in Mege's patent, and that the prisoner has such authority as the patent confers, to sell it.

The validity of the patent is not disputed.

Has the prisoner, then, a right to sell the article thus patented, notwithstanding the statute of Missouri, which forbids such sale?

The constitution, article I, section 8, clause 8, gives congress power "To promote the progress of science and useful arts by securing, for a limited time, to authors and inventors the *exclusive right* to their respective writings and discoveries," and the act of congress which is designed to give effect to this clause, declares that, in every case where a patent is issued under it, the patentee shall have the *exclusive right to make, use and sell* the subject matter of his patent, whatever it may be.

It is to be observed that no constitutional or statutory provision of the United States was, or ever has been, necessary to the right of any person to make an invention, discovery or machine, or to use it when made, or to sell it to some one else. Such right has always existed, and would exist now if all patent laws were repealed. It is a right which may be called a natural right, and which, so far as it may be regulated by law, belongs to ordinary municipal legislation; and it is unaffected by anything in the constitution or patent laws of the United States.

The sole object and purpose of the laws which constitute the patent and copyright system is to give to the author and the inventor a monopoly of what he has written or discovered. That no one else shall make, or use, or sell his writings or his invention without his permission; and what is granted to him is the exclusive right, not the abstract right, but the right in him to the exclusion of everybody else.

For illustration, an author who had written or printed a book always had the right to do so, and to make and sell as many copies as he pleased, and he can do this though he takes out no copyright for his work.

But if he wishes to have the benefit of the exclusive right to do this, he can get it by securing a copyright under the act of congress.

All that he obtains, then, by this copyright, all that he asks for, or needs, and all it was designed to confer on him, is to make the right which he had already in common with everybody else, an exclusive right in him — a monopoly in which no one can share without his permission.

But let us suppose that the book which he has thus copyrighted is an obscene and immoral book, which, by the law of the state in which it is published, may be seized and destroyed, and for that reason; does this statute, which forbids any one else but him to print or publish it, authorize him to do so? Can he violate the law because no one else can do it? Does the copyrright confer on him a monopoly of vice, and an immunity from crime?

Suppose a discovery of a cheap mode of producing intoxicating liquor, in regard to which the inventor obtains a patent for the product; does this authorize him to defy the entire system of state legislation for the suppression of the use of such drinks?

The answer is, that the purpose of the patent law and of the constitutional provision are answered when the patentee is protected against competition in the use of his invention by others; and when the law prevents others from infringing on his exclusive right to make, use or sell, its object is accomplished.

This proposition is fully supported by the supreme court in the case of *Patterson* v. *Kentucky*, 97 U. S. 501.

That case also cites with approval the following language from the opinion of the supreme court of Ohio, in the case of *Jordan* v. *The Overseers of Dayton*, 4 Ohio R. 295: "The sole operation of the statute (the patent law) is to enable him (the inventor) to prevent others from using the product of his labors except with his consent. But his own right of using is not enlarged or affected. There remains in him, as in every other citizen, the power to manage his property or give direction to his labors at his pleasure, subject only to the paramount claims of society, which require that his en-

joyment may be modified by the exigencies of the community to which he belongs, and regulated by laws which render it subservient to the general welfare, if held subject to state control."

The principle is reaffirmed in *Webber* v. *Virginia*, 103 U. S. 344.

Second. Does the Missouri statute impair the obligation of any contract?

The only one to which we are referred as affected by it is the contract found in the patent between the United States and the patentee.

Some reference is made to a contract between the *public* and the patentee.

We know of no such contract in a case like this, except such as may be found to exist between the parties to it, namely, the United States on one side, and the patentee on the other. If we concede such a contract to exist, it can extend no further than the right granted to the patentee under the patent laws. We have already shown that this is not the original or absolute right to make, to use and to sell, which is a right not dependent on the patent, but the right to be protected against the manufacture, use or sale of this product by others without his permission. When the state of Missouri shall pass a law that everybody may manufacture, use and sell oleamargarine, it will probably impair the obligation of the Mege patent. If it does not, it will certainly authorize the infringement of his right under the patent, and will be void for that reason. It will be, then, immaterial whether it impairs the obligation of his contract or not.

Third. We are unable to see that it is a regulation of commerce among the several states.

If it can be called a regulation of commerce at all, it is limited to the internal commerce of the state of Missouri. Being a criminal statute, there is no pretense that it can have any operation outside the boundary of the state. The person who manufactures or sells the article outside the state is not liable to the penalties of the law.

The statute does not forbid its importation or exportation — the bringing of it into the state, or carrying it out of the state. Nor is its use in the state forbidden to those who choose to use it, even for food.

It is only forbidden to manufacture it or to sell it for food, to take the place of butter for that purpose. For all other purposes it may be made and sold in the state, and for that purpose, or any other, it may be imported or exported without violating the law.

If it could be seen that the law was directed by way of discrimination against the product of a sister state, while no such prohibition existed against the same product in Missouri, or was intended to prevent buying and selling between the states, or importation and exportation, whereby the citizens or the productions of a neighboring state were placed in a worse position in regard to that article than the citizens or the productions of Missouri, the argument would not be without force. Such is the doctrine laid down by the supreme court of the United States in *Woodruff* v. *Parham*, 8 Wall. 123; and in *Hinson* v. *Lott*, id. 148; and *The Freight Tax Cases*, 15 Wall. 232; *United States* v. *De Witt*, 9 Wall. 41.

Fourth. We are next to inquire whether the statute deprives the owner of this product of his property within the meaning of the clause of the fourteenth amendment, which says: "Nor shall any state deprive any person of life, liberty or property without due process of law."

The statute does not in direct terms authorize the seizure or taking of any property, not even that whose manufacture is forbidden.

The party is not, in fact, deprived of this property by the statute or by any proceeding which it authorizes. The personal punishment by fine and imprisonment which the statute imposes must be inflicted according to the law of Missouri, which allows a trial by jury, with all the other forms which from time immemorial have been held to be due process of law. The moneyed fine, then, and the liberty of which the

party may be deprived are undoubtedly imposed by due process of law.

If it be urged, as it has in some cases, that the effect of the statute upon the right to sell the property is such as to destroy its value, and therefore to deprive the owner of it, there are several answers to the proposition:

First, the value of the property can hardly be so affected that the party may be said to be deprived of it, while it can readily be transported into some other state, and sold without restriction.

Secondly and conclusively, that as to the product made or imported into state after the passage of the statute, the statute was and must be taken as part of the due process of law, and deprived the party of nothing which he owned when it was passed, or which he had a right to make or acquire for sale as food at the time he did so make or buy it.

The law in such case did not deprive him of his property. If he is injured in relation to that property, it is by his own action in buying or making it, with the statute before his eyes. That statute was, as to him, and to this property, due process of law, of which he had due notice. *Bartemeyer* v. *State of Iowa*, 18 Wall. 132. His injury or loss, if any, arises out of his determination to defy the law, and it is by the law and its mode of enforcement, which, existing at the time, is due process of law, that he must be tried.

Fifth. The evidence in favor of the petitioner is abundant, and of the highest character to prove that the article which he sells, and which he is forbidden to sell by the statute of Missouri, is a wholesome article of food, prepared from the same elements in the cow which enable her to yield milk from which butter is made, and, when made by Mege's process, is the equal in quality for purposes of food of the best dairy butter.

No evidence is offered by counsel for Rucker or for the state to contradict this, because they say it is wholly immaterial to the issue before the court.

A very able argument is made by counsel, whose ability commands our respect, to show that such being the character of the article the manufacture and sale of which is forbidden by the statute, the legislature of Missouri exceeded its powers in passing it.

It is not so much urged that anything in the constitution of Missouri forbids or limits its power in this respect by express language, as that the exercise of such a power in regard to a property shown to be entirely innocent, incapable of any injurious results or damage to public health or safety, is an unwarranted invasion of public and private rights, an assumption of power without authority in the nature of our institutions, and an interference with the natural rights of the citizen and of the public, which does not come within the province of legislation.

The proposition has great force, and, in the absence of any presentation of the motives and circumstances which governed the legislature in enacting the law, we should have difficulty in saying it is unsound.

Fortunately, as the case before us stands, we feel very clear that, even if well founded, this objection to the statute is one which we cannot consider in this case.

As already stated, when a writ of *habeas corpus* is issued by the circuit court in behalf of one in custody of a state officer, under judicial proceedings in state courts and under state laws, the only inquiry we can make is, whether he is held in "violation of the constitution, or of a law of congress, or a treaty of the United States."

The act in question may be in conflict with the constitution of the state, without violating the constitution, or any law or treaty of the United States.

It may be in excess of the powers which the people of Missouri have conferred on their legislative body, and therefore void, without infringing any principle found in the constitution, laws or treaties of the United States.

We have, in the four objections to this statute first con-

sidered, examined all the points in which it is supposed to conflict with the constitution and laws of the United States, and we know of no others, and no others have been suggested.

The proposition now under consideration, if well taken, is one for the consideration of the state court when this case comes to trial. It is, in a *habeas corpus* case in the federal courts, excluded by the express language of the statute conferring jurisdiction in such cases. This court does not sit here clothed with full and plenary powers either of common law or of criminal jurisdiction. Its criminal jurisdiction is still more limited than its jurisdiction at common law and in chancery.

It has, in common with the district court, jurisdiction of all offenses against the statutes of the United States. Such is not the case before us.

Section 753 goes further, and authorizes the court to issue writs of *habeas corpus* in all cases where a person is in custody in violation of the laws of the United States, including its constitution and its treaties.

The prisoner in this case is not prosecuted for a crime or offense against the United States. We have, therefore, no general jurisdiction of the case.

We have endeavored to show that while held under a law of Missouri by Missouri officials, it is not in violation of, it is not forbidden by the constitution, or any law or treaty of the United States; and the act of congress, under which alone we can exercise the special power of issuing writs of *habeas corpus*, permits us to go no further.

The return of the constable, Rucker, to the writ is sufficient, and the prisoner must be remanded to his custody, and is so ordered.

McCrary, *Circuit Judge*, concurs.

Roscoe Conkling, Offield & Towle, Tichenor, Warner & Dean, for petitioners.

E. P. Gates and *Wash Adams, Jr.*, for respondent.

The United States *v.* Beebe *et al.*

(Eastern District of Arkansas. June, 1883.)

1. Equity — Lapse of Time as a Defense.— It is a general principle of equity that lapse of time may constitute a sufficient defense, even in the absence of any statute of limitations, and without necessary reference to any question of laches.
2. Same — Same — Same.— When the lapse of time has been so great as to afford a reasonable presumption that the witnesses are dead and the proofs lost or destroyed, a court of equity will refuse to undertake the task of ascertaining the facts and affording a remedy, and this not because of any statutory limitation, or because of laches merely, but upon grounds of public policy and for the peace of society.
3. The United States Bound by These Rules.— Lapse of time may be a sufficient defense to a suit instituted in the name of the United States. When the government becomes a party to a suit in its courts, it is bound by the same principles that govern individuals. When the United States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants.

The facts are sufficiently stated in the opinion.

McCrary, *Circuit Judge.*— The demurrer raises for the first time in a federal court, the important question whether any lapse of time will constitute a bar, or a sufficient defense, to a suit in equity, brought in the name of the United States.

This suit is brought to cancel and set aside certain land patents executed by the United States, on the ground that the same were obtained by fraud. The patents attacked as fraudulent were issued about forty-three years before the filing of the bill, and many of the alleged matters of fact, concerning which it would be necessary to take proofs in order to determine the question of fraud, transpired more than sixty years before the filing of the bill, as appears from its allegation. The claims of the Philbrook heirs, which it is alleged were unlawfully and fraudulently set aside by the action of the land department, had their inception in Novem-

ber, 1815. The frauds alleged to have been perpetrated by C. W. Bebee and Chester Ashley consisted, as alleged, in inducing the register of the land office to believe that the settlers on the land had consented to the issuance of the patents; and it appears that whatever they did do to this end was done prior to October, 1838. Both the parties charged to have actually participated in the fraud are long since dead, and we may assume that most, if not all, the witnesses who could testify from personal knowledge concerning it are likewise dead. The city of Little Rock, now the capital of Arkansas, has been built upon the land, and hundreds of innocent purchasers have bought and paid for portions of it upon the faith of the patent of the United States. The land is covered with the homesteads of many hundreds of families. It has been thus occupied in many instances by the present holders and their predecessors for more than a generation. A court of equity cannot contemplate with any degree of favor the proposition that this land shall, at this late day, be declared a part of the public domain, or granted to claimants who have so long slept upon their rights. It must, however, be conceded that, as a general rule, the United States is not bound by any statute of limitations, not imposed by congress, nor chargeable with laches.

The following cases, cited by counsel for plaintiff, abundantly support this general doctrine: *United States* v. *Kirkpatrick*, 9 Wheaton, 720; *Gibson* v. *Choteau*, 13 Wallace, 92; *Gansen* v. *United States*, 97 U. S. 584; *United States* v. *Thompson*, 98 U. S. 486.

These are all, it is true, actions at common law, but the same doctrine must, no doubt, prevail in equity, where the statute of limitations is sought to be interposed, in analogy to a like limitation at law. Unless, therefore, this defense can be supported upon some principle of equity jurisprudence, separate and distinct from any state statute of limitations, and from any considerations based alone upon the

laches of the public agents of the government, it must fail, however disastrous to the rights of innocent parties, and however inequitable the consequences may be.

We are thus brought to the consideration of the question whether a lapse of time so great as to afford a clear presumption that all the witnesses to the transaction in controversy are dead, and all proof lost or destroyed, will of itself constitute a bar to a suit in equity, independently of any statute of limitations and without regard to any question of laches; or, in other words, should a court of equity refuse to entertain a bill in equity upon the sole ground that the lapse of time has been so great as to make it impossible to ascertain the facts and apply the remedy, by reason of the death of the witnesses and the loss or destruction of proofs. In my judgment, the doctrine that a court of equity will not entertain a claim so stale as to be not capable of satisfactory proof must stand as one applicable alike to all suitors; it rests not upon any statute of limitations, nor upon any doctrine of laches alone, although the fact of laches may always appear; it rests rather upon the sound rule that no court should ever entertain a controversy after the ravages of time have destroyed the evidence concerning it. A party called upon to answer to a charge of fraud committed by his ancestors, or those through or under whom he claims, more than forty years before the commencement of the suit, need not plead the technical bar of the statute of limitations or the laches of the complainant; it is enough if he alleges that the claim is stale, and insists that by reason of the long delay in bringing suit the witnesses by whom he might have explained the transaction are dead. To compel him to submit his rights to adjudication under such circumstances would be abhorrent to the principles of equity, not because of any statutory bar or any laches merely, but because the great lapse of time is evidence against the complainant and in favor of the defendant, and because it is contrary to equity and good conscience that any person should be brought into court to

answer for a fraud alleged to have been committed by others before he was born, and so long ago as to make it impossible for him to find living witnesses who have personal knowledge of the facts. Under such circumstances a court of equity ought to presume that the persons who were cognizant of the facts could, if living, explain them so as to disprove the charge of fraud. It is well settled that possession of land for a long period of time will raise a presumption of a grant which will be enforced as against the government. *Mayor* v. *Horner*, Cowper, 102; *Jackson* v. *McCall*, 10 J. R. 380; *Lewis* v. *San Antonio*, 7 Texas, 304; 3 Starkie, 1221; 2 Wharton on Evidence, sec. 1348; *Rowe* v. *Ireland*, 11 East, 230. And if a grant is to be presumed by reason of the lapse of time, when there is no other evidence of a grant except that afforded by long possession, it would seem that, upon similar grounds, the validity of a grant which is shown to have been actually executed, and under which possession has been held for an equally long period of time, should be presumed. The authorities support the proposition that lapse of time may be a good defense in equity, independently of any statute of limitations, and they show that the doctrine rests not alone upon laches; it is often put upon one or all of the following grounds, namely:

First. That courts of equity must, for the peace of society and upon grounds of public policy, discourage stale demands by refusing to entertain them.

Second. That lapse of time will, if long enough, be regarded as evidence against the stale claim equal to that of credible witnesses, and which, being disregarded, would in a majority of cases lead to unjust judgments.

Third. That after the witnesses who had personal knowledge of the facts have all passed away, it is impossible to ascertain the facts, and courts of equity will on this ground refuse to undertake such a task.

Thus Mr. Justice Story says: "A defense peculiar to courts of equity is founded on the mere lapse of time, and

the staleness of the claim, in cases where no statute of limitations directly covers the case. In such cases, courts of equity act sometimes by analogy to the law, and sometimes act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere when there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights." 2 Story's Equity, 1520. And in *Maxwell* v. *Kennedy*, 3 Howard, 221, the supreme court of the United States, in answer to the argument that there was no statute of limitations applicable to the case at bar, said: "We think the lapse of time, upon the facts stated in the bill and exhibits, is upon the principles of equity a bar to the relief prayed, without reference to the direct bar of a statute of limitations."

Again, in *Clark* v. *Boorman*, 13 Wallace, 509, the same court said: "Every principle of justice and fair dealing, of the security of rights long recognized, of repose of society, and the intelligent administration of justice, forbids us to enter upon an inquiry into that transaction, forty years after it occurred, when all the parties interested had lived and died without complaining of it, upon the suggestion of a construction of a will different from that held by the parties concerned, and acquiesced in by them throughout all this time."

In *Brown* v. *County of Buena Vista*, 95 United States, 161, the same doctrine is expressed in these words: "The lapse of time carries with it the memory and life of witnesses, muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose and welfare of society. A departure from it would open an inlet to the evils intended to be excluded."

In *Harwood* v. *Railroad Company*, 17 Wallace, the doctrine is concisely and clearly stated thus: "Without referring to any statute of limitations, the courts have adopted the principle that the delay which will defeat a recovery

must depend upon the particular circumstances of each case."

In *Badger* v. *Badger*, 2 Wallace, 94, the court said: "But there is a defense peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitations covers the case; in such cases courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, and refuse to interfere where there has been gross laches in prosecuting the claim or long acquiescence in the assertion of adverse rights."

In *Boone* v. *Childs*, 10 Peters, 248, the rule is thus laid down: "A court of chancery is said to act on its own rules in regard to stale demands, and independent of the statute; it will refuse to give relief where a party has long slept on his rights, and where the possession of the property claimed has been held in good faith, without disturbance, and has greatly increased in value."

In *Wilson* v. *Anthony*, 19 Arkansas, cited with approval by the supreme court of the United States in *Sullivan* v. *Railroad Company*, 94 United States, 811, the doctrine is well stated thus: "The chancellor refuses to interfere after an unreasonable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscured by time, and the evidence may be lost."

And see *Elmendorf* v. *Taylor*, 10 Wheaton, 173; *Hume* v. *Beale*, 17 Wallace, 343; *Hall* v. *Law*, 102 U. S. 465; *Godden* v. *Kimmel*, 99 U. S. 210.

Numerous other authorities might be cited to the same effect, but these are sufficient.

In view of these authorities and upon reason, I hold it to be a general principle of equity that lapse of time may constitute a sufficient defense, even in the absence of any statute of limitations, and without necessary reference to any question of laches.

Such being the law, it is clear that lapse of time may be a sufficient defense to a suit instituted in the name of the government.

It is well settled that when the United States becomes a party to a suit in the courts, and voluntarily submits its rights to judicial determination, it is bound by the same principles that govern individuals. When the United States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants. *United States* v. *Fossatt*, 21 Howard, 450; *The Floyd Acceptances*, 11 Wallace, 675; *United States* v. *Barker*, 12 Wheaton, 561.

In *Mitchell* v. *United States*, 9 Peters, 557, the court said: "By common law the king has no right of entry on land which is not given to his subjects; the king is put to his inquest of office or information of intrusion in all cases where a subject is put to his action. Their right is the same, though the king has more convenient remedies in enforcing his. If the king has no original right of possession to land, he cannot acquire it without office found so as to annex it to his domain." And see *United States* v. *State Bank*, 96 U. S. 36; *United States* v. *Bostwick*, 94 U. S. 66. "The principles which govern inquiries as to the conduct of individuals in respect to their contracts are equally applicable where the United States are a party." *United States* v. *Smith*, 94 U. S. 217.

In the case of *The Siren*, 7 Wallace, 159, the court said: "But, although direct suits cannot be maintained against the United States or against their property, yet when the United States institute a suit they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed; and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libeled." And in the same case it was said that the government by its appearance in court "waives its exemptions and

submits to the application of the same principles by which justice is administered between private suitors."

See, also, *Burbank* v. *Fay*, 65 N. Y. 62; *Osburne v. Bank*, 9 Wheat. 870; *United States* v. *McDonald*, 7 Peters, 1; *Brent* v. *Bank of Washington*, 10 Peters, 615. In the latter case the court declares that there is no reason why the United States should be exempted from a fundamental rule of equity subject to which its courts administer their remedy, and it is said: "Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come as other suitors, seeking in the administration of the law of equity relief," etc.

The same doctrine was laid down in strong language by Attorney General Black in *Reside's Case*, vol. 9 of Opinions of the Attorney General, 204, and also in the case of *The People* v. *Clark*, 10 Barbour, 120. In the latter case, which was a bill instituted by the attorney general of New York to cancel certain patents granted before the revolution, the court said: "If the questions in this case may be deemed to belong to a court of equity, I cannot persuade myself that they are therefore never to be put at rest by lapse of time. It would be an alarming doctrine to hold that every man in the state who holds any land under a grant before the revolution may be turned out of possession by the plaintiffs, if a king was cheated who, one or two hundred years since, made the grant."

See also, upon this point, *Mayor of Hull* v. *Horner*, Cowper's Reports, 110, decided by Lord Mansfield.

These considerations lead to the conclusions:

First. That the lapse of time constitutes a good defense to this suit upon the general principles of equity above stated, and which would be administered as between two citizens litigating in this tribunal; and,

Second. That the United States is bound by the same law.

These conclusions render it unnecessary to consider the other important questions discussed by counsel.

The court, however, deems it proper to say, in view of some remarks of the counsel for respondents, that, in its opinion, the official action of the attorney general in directing that the bill be filed, cannot properly be made the subject of adverse criticism. The bill was filed upon the recommendation of the secretary of the interior, for the declared purpose of having the questions which were being pressed upon the attention of the land department in connection with the claims of the Philbrook heirs, determined by the judicial department of the government. Those questions are important and unsettled. An appeal to the courts was therefore entirely proper.

The demurrer to the bill is sustained, and unless the complainants ask leave to amend, there will be a decree for respondents dismissing the bill.

CALDWELL, *District Judge*, being interested, took no part in this case.

Cummings & Baker and *Liberty Bartlett*, for complainant.

U. M. & G. B. Rose, Clark & Williams and *J. M. Moore*, for respondents.

EDWARD E. COOK *et al.*, Executors, *v.* HOYT SHERMAN, Assignee, *et al.*

IRA COOK *et al. v.* THE SAME.

(District of Iowa, Central Division. May, 1883.)

1. CORPORATION — CONTRACT — INTEREST OF OFFICERS OR DIRECTORS — PUBLIC POLICY. — A contract entered into by officers and directors of a railroad company to buy lands, and to afterwards locate the line of a projected railroad, and its depots and stations, on or near such lands, is contrary to public policy, and will not be enforced or made the basis of relief in a court of equity.
2. DIRECTORS — NATURE OF THEIR OFFICE AND DUTIES. — Directors are *quasi* public officers occupying a position of trust and acting in a

fiduciary capacity. They represent the stockholders, and must not have private interests adverse to those of the stockholders.

3. ILLEGAL CONTRACT — RIGHTS OF PARTIES INTER SESE. — When several persons enter into an illegal contract for their own benefit, and the illegal transaction has been consummated and the proceeds of the enterprise have been actually received by one of such parties and carried to his credit, so that he can maintain an action therefor without the aid of the illegal transaction, he may be entitled to relief. The question in such a case must be, can the plaintiff maintain his action without enforcing the illegal contract?

4. BANKRUPT ACT — LIMITATION. — The two years' limitation prescribed by sec. 5057 of the Revised Statutes of the United States does not begin to run as against a suit for fraud until the discovery of the facts constituting the fraud.

5. TRUSTEE AND CESTUI QUE TRUST — DUTY TO MAKE FULL DISCLOSURE. — Where several parties bought real estate and caused the title to be vested in one of their number for their joint use, and authorized him to make sales and divide the proceeds, *held*, that the holder of the title became a trustee for the others, and before he could purchase their interest he was bound to make a full and fair disclosure of all the facts, so as to enable them to deal with him on terms of perfect equality.

6. STATUTE OF LIMITATIONS — ASSIGNEE IN BANKRUPTCY. — The assignee in bankruptcy takes the place of the bankrupt, and is charged with constructive notice of any concealment of a fraud by the latter. For the purposes of the statute of limitations they must be regarded as one person.

7. SAME — AFFIRMATIVE ACTS OF CONCEALMENT. — Where the fraud charged is of such a nature as to conceal itself, no affirmative acts of concealment need be shown.

8. CONTRACT — TRUSTEE AND CESTUI QUE TRUST — RESCISSION. — A settlement between trustee and *cestui que trust*, wherein, by concealment of material facts within his knowledge, the trustee induces the *cestui que trust* to convey to him the trust estate for an inadequate consideration, is not a contract, which must be rescinded as soon as the fraud is discovered in order to be set aside by a court of equity.

These causes have been submitted upon final hearing.

The material facts, so far as it is necessary to state them, are as follows:

1. Prior to the year 1868 the Chicago, Rock Island & Pacific Railroad Company had been organized as a corporation

under the laws of Iowa, and was about to extend its line of railroad from Des Moines to Council Bluffs.

2. Some time in 1868, B. F. Allen, then a banker at Des Moines, and a director of the said railroad company, Ebenezer Cook and John P. Cook, the former also a director of said company, entered into a verbal contract for the purpose of purchasing the necessary grounds for the said railroad company, upon which to locate its stations between De Soto, Dallas county, Iowa, and Council Bluffs, and also for purchasing lands adjacent to such stations, portions of which should be laid out into town lots. J. R. Tracy, the president of said railroad company, and Edward H. Johnson, the chief engineer of said company, though not named in said contract, were to be interested in the profits thereof.

3. In April, 1870, said contract (which had in the mean time been acted upon by the parties) was reduced to writing, and certain additional stipulations were inserted in the written contract.

This written contract is set out as Exhibit "B" to the bill, and it provides, in substance, that in pursuance of the verbal contract above named the parties did proceed to purchase the necessary grounds for the Chicago, Rock Island & Pacific Railroad Company, upon which that corporation could locate its stations between the points above named, as well as large tracts of land adjoining or near the stations so located.

It states that by the verbal contract it was provided that B. F. Allen should furnish the money to make such purchases, for which he should receive an annual interest at the rate of ten per cent. on his advances and the principal sum out of the first money received on the sale of any real estate belonging to the joint account; that the title to all said real estate should be taken in the name of said Allen as trustee for said joint account, and that the net profits in the transaction should be divided between the parties as follows, to-wit: One-half to Ebenezer Cook, one-fourth to B. F. Allen, and one-fourth to John P. Cook.

The contract has annexed to it a schedule of the lands which had been bought prior to the time of its execution, and it provided that the said Allen should keep a correct account of the amount paid out by him for said real estate, and of sales, receipts and expenses, so that from his book a statement may be made at any time showing the situation of the property, amount sold, at what price, etc.

It further provided that sales should be made by said John P. Cook and Allen on the best terms they, in their discretion, can make, and Allen was to attend to paying the taxes, and to charge the same, as well as any other legitimate expenses, to the joint account, and to pay the net proceeds to the parties in the proportions above named.

4. The said Allen sold portions of said real estate, and kept an account of his receipts and expenditures under the contract, but the correctness of said account is denied by complainants.

5. In August, 1871, John P. Cook sold and assigned half of his interest in said contract to complainant E. E. Cook.

6. The said John P. Cook and Ebenezer Cook having deceased, these suits are instituted by their respective legal representatives and heirs, the said E. E. Cook being joined as a complainant in his own right.

7. About January, 1873, the complainants, the executors of the estate of John P. Cook and of Ebenezer Cook, and the said E. E. Cook individually, made a settlement of their interests in the joint account, under the contract aforesaid, with B. F. Allen, and executed to him transfers and assignments of all their interest in said contract and in the property purchased under the same.

The bill alleges that this conveyance and assignment was obtained by fraud and misrepresentation on the part of Allen, and prays that the same be set aside.

8. In January, 1875, Allen was adjudged bankrupt, and the defendant, Hoyt Sherman, was appointed as assignee, and was also afterwards appointed receiver for the purposes of these cases.

9. The facts constituting the alleged fraud, whereby the assignments and releases were obtained, were discovered August 29, 1878, and the present bills were respectively filed March 24, 1880, and May 10, 1880.

Wright, Cummins & Wright, and *Bills & Block,* solicitors for complainants.

Nourse & Kauffman, solicitors for respondents.

McCrary, *Circuit Judge.*— In these cases the two most important questions to be considered are, first, is the contract declared upon contrary to public policy so that no relief can be based upon it? and second, if so, have the complainants made out a case for relief independently of the contract?

It clearly appears that Allen and Ebenezer Cook, who were directors of the Chicago, Rock Island & Pacific Railroad Company, and J. F. Tracy, the president, and Edward H. Johnson, the chief engineer of that company, entered into an agreement into which John P. Cook was admitted as a party in interest, to purchase the lands in question, in advance of the location of the line and of the depots and stations of said railroad, with a view to locating the same on or near such lands.

Such a contract by officers of a railroad corporation is contrary to public policy, and one which will not be enforced or made the basis of any relief in a court of equity.

The directors of such a corporation are *quasi* public officers.

They occupy a position of trust and act in a fiduciary capacity.

They represent, not themselves, but the stockholders.

They are, in all their official actions, to consider, not their private interest, but that of the stockholders whose property they manage and control.

If, as in this case, they are directors of a railway company, with power to locate and construct a public highway,

they owe a duty to the public as well as to the stockholders, and are therefore doubly bound to abstain from entering into any scheme to pervert their trusts to their private gain.

The law does not permit these officials to subject themselves to any temptation to serve their own interests in preference to the interests of the stockholders and of the public.

If the courts should enforce such contracts, they would lend their sanction to a practice the inevitable tendency of which is to encourage breaches of trust to the sacrifice of private rights and of the public interest.

The managing officers of *quasi*-public corporations, possessing vast powers and engaged in great enterprises, are too apt to forget that they are not to have any interest adverse to those whom they represent, and the courts of justice should not in the least relax the rule requiring of them scrupulous fidelity and entire impartiality in the discharge of their official duties.

The present case well illustrates the importance of the rule of law to which we refer.

The parties interested in this contract controlled the location of the railroad, and of its depots and station grounds.

After they had bought lands along the line, with a view to making money by the location of the line and of the depots and stations upon or near them, it needs no argument to show that they were utterly unfit and incompetent to decide as between a location upon their own lands and a location elsewhere.

It follows that the contract under consideration can neither be enforced nor made the basis of any relief whatever in a court of equity.

The court will leave the parties to such a contract precisely where it finds them. *Marshall* v. *Railroad Company*, 16 How. 314; *Bank* v. *Owens*, 2 Peters, 539; 2 Redf. on Railways, 576–584; Pomeroy on Specific Performance, 284–6; *Wright* v. *Rindskopf*, 43 Wis. 344; *McWilliams* v. *Phillips*, 57 Wis. 196; *Guernsey* v. *Cook*, 120 Mass.

501; *Setter* v. *Avery*, 15 Kan. 157; *Creath* v. *Sims*, 5 How. 204; *Bestor et al.* v. *Wathen et al.* 60 Ill. 138.

This brings us to the consideration of the second question, which is, have the complainants shown themselves entitled to relief independently of the illegal contract?

It has been decided by the supreme court of the United States that where several persons enter into an illegal contract for their own benefit, and the illegal transaction has been consummated, and the proceeds of the enterprise have been actually received and carried to the credit of one of such parties, so that he can maintain an action therefor without requiring the aid of the illegal transaction to establish his case, he may be entitled to relief. *Brooks* v. *Martin*, 2 Wall. 70; *Planters' Bank* v. *Union Bank*, 16 Wall. 483.

The rule upon this subject is accurately stated in the last named case as follows:

"But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; and when they have been carried to the credit of the plaintiff, the case is different.

"The court is there not asked to enforce an illegal contract.

"The plaintiffs do not require the aid of any illegal transaction to establish their case.

"It is enough that the defendants have in hand a thing of value that belongs to them."

According to this rule, the question in such cases must always be, can the plaintiff maintain his action without enforcing the illegal contract? or, in other words, has he a cause of action independently of the illegal contract?

If it appears that the defendants in a given case have received money or property from the complainants, and which belongs to the latter, the same may be recovered without any inquiry into the nature of the contract under which such money or property was acquired.

The distinction is between enforcing an illegal contract and asserting title to money and property which has arisen from it.

Applying this rule, we have no difficulty in holding that the complainants in the case last above named cannot recover.

It does not appear that Ebenezer Cook ever contributed any money, property or services toward the acquisition of the property in question. His representatives, therefore, have no right which can be enforced without the aid of the illegal contract. As to them, the bill in effect is a suit to enforce the contract by decreeing a division of profits in accordance with its terms.

It follows that the bill in that case (No. 1779) must be dismissed.

As to the other case there is more difficulty.

The evidence does show that John P. Cook contributed his services, and probably also he expended some money to acquire the property in question.

His representatives, therefore, are, upon the principle above stated, entitled to an accounting, and to receive from the joint account such sum as he would have been entitled to by reason of those contributions, unless the suit is barred by law or by reason of the laches of the complainants.

It is insisted that the suit is barred by the two years' limitation provided by sec. 5057 of the Revised Statutes of the United States, which requires that all suits at law or in equity against an assignee in bankruptcy, touching any property or rights of property transferable to or vested in such assignee, shall be brought within two years from the time when the cause of action accrued.

It will be borne in mind that this suit is brought to set aside for fraud the release executed by complainants to Allen, as well as to recover the complainants' share in the joint account.

The suit was not brought within two years from the exe-

cution of said release, but we think the proof shows that it was brought within two years from the time when the complainants discovered the facts.

If the facts were such as to render the transaction fraudulent, then the statute did not begin to run until they were discovered. *Bailey, Assignee*, v. *Glover et al.* 21 Wall. 342.

In that case it was held that the statute above referred to is a statute of limitation precisely like other statutes of limitation, and that in construing it we are to apply the rule that where the action is intended to obtain redress against a fraud concealed by the party, or which from its nature remains secret, the bar does not commence to run until the fraud is discovered.

Without discussing at length the question of fact presented, we hold that the release was obtained by Allen under circumstances which renders it fraudulent and void. The relation which existed between the parties was one of trust and confidence. The title was vested in Allen, to be held for the use and benefit of the other parties in interest. He was advised as to the situation and value of the property, and as to the state of the joint account. He was bound, therefore, to make a full and fair disclosure of all the facts, so as to enable the other parties to deal with him upon terms of perfect equality. He seems to have assumed, on the contrary, that he was at liberty to make the best bargain possible for himself. He did not accurately state to them the condition of the joint account, or the amount of his claim against the same, and by his actions and words he led them to believe that it was extremely doubtful whether any profit could be realized out of the transaction, and in this belief they executed the release. It must therefore be held to be fraudulent and void.

The complainants did not discover the facts constituting this fraud until within less than two years from the time of the commencement of this suit.

It is insisted by counsel for respondents that the statute does not apply to this case because the assignee in bank-

ruptcy, who pleads the limitation, is not charged with the commission or concealment of any fraud.

It is said that the rule applies only to a case where the party pleading the statute is himself guilty of a fraud, which he has concealed, and that therefore it does not apply to the assignee.

While the general rule is, no doubt, as stated, it does not follow that a distinction in this respect can be made between the bankrupt and his assignee. For the purposes of the statute of limitations they must be treated as one person. The assignee takes the place of the bankrupt. If, by reason of the fraud of the bankrupt, the two years' limitation had not commenced to run at the time of the bankruptcy, it did not begin to run by reason alone of the transfer of the estate to the assignee. The question in every such case must be, did the fraud continue to be unknown to the plaintiff after the appointment of the assignee, without any negligence or laches on the part of plaintiff?

If, indeed, the fraud of the bankrupt was of such a character as to require special efforts on the part of the assignee to keep it secret, so that but for such efforts on his part the plaintiff must have discovered it by reasonable diligence, then it might be necessary to show affirmative acts of concealment on the part of the assignee; but if the facts constituting the fraud were known only to the bankrupt, and were of such a character as to conceal themselves, no proof of actual concealment by the assignee is necessary.

The assignee himself may be ignorant of the fraud, as in most cases it is to be presumed he would be, yet he represents the bankrupt, stands in his shoes, and is charged with constructive notice of his fraudulent acts.

If it were otherwise, the bankrupt might, by concealing even the grossest frauds for two years from the assignee, as well as from others, be enabled to consummate them. We hold, therefore, that it is not necessary to show in this case

affirmative acts of concealment on the part of the assignee. As we shall presently see, the facts constituting the fraud on the part of the bankrupt, or at least a material part of them, were such as to conceal themselves.

It is also insisted that this case does not fall within the rule laid down in the case of *Bailey* v. *Glover*, because the fraud was not concealed by any affirmative acts of Allen. Is it true that complainants are bound to show such affirmative acts? The rule upon the subject by which we must be governed is thus stated in the opinion of the court, pronounced by Justice Miller, in *Bailey* v. *Glover:*

"We also think that, in suits in equity, the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

In this case, as we have already seen, the fraud was committed by a trustee against his *cestui que trust* by failing to make a full disclosure as to the state of the joint account, and as to the value of the joint estate.

The proof shows, as we have already said, that the facts as to the state of the accounts were exclusively within the knowledge of Allen, and it is apparent, also, that as to the location, character and value of the lands, he had far better means of knowledge, and doubtless much more accurate information, than any other of the parties in interest.

In fact, after the death of John P. Cook, the parties in interest, aside from Allen, had little or no information upon the subject.

In view of the relation existing between the parties, we are of the opinion that the complainants were at liberty to rely upon the representations of Allen as to the value of the

lands acquired under the contract, without visiting and examining the lands, or investigating for themselves the question of their actual value.

But a further and more conclusive answer to this suggestion is to be found in the fact that the misrepresentations and concealments by means of which the release was obtained did not relate exclusively to the value of the lands, but had reference in part to the joint account, the amount of Allen's claim against the same, and the balance in his hands for distribution, all being matters exclusively within Allen's knowledge, and concerning which the complainants were obliged to rely upon him.

The amount of Allen's claim against the joint account was largely overstated by him, and the quantity of land sold and the sum realized from sales by him was largely understated, as was also the amount of bills receivable held by him.

These matters of themselves were sufficient to render the transaction null and void, without reference to the representations made concerning the value of the lands, and they are manifestly matters which could not be discovered so long as Allen chose to conceal them.

In other words, they constituted a fraud which was of such a nature as to conceal itself.

It is insisted that the complainants, or some of them, had information more than two years before the commencement of this suit which was sufficient to put them on inquiry and charge them with notice of the fact.

The proof is that E. E. Cook heard Thomas F. Withrow remark, more than two years before the commencement of this suit, that Allen had defrauded or swindled the other parties in interest; but the remark was made in a casual way.

No particulars of any alleged fraud were given, and Cook, having strong faith in Allen's integrity, might well have dis-

believed and disregarded the statement. There is nothing to show that his confidence in Allen was shaken by the remark, and, if not, he was not called upon to act upon it. We hold that the suit is not barred by the statute.

Another question of some difficulty arises in this case. It is whether the complainants were bound, immediately upon the discovery of the fraud, to give notice of rescission, and to offer to return the consideration for the release, within the principle of *Grymes* v. *Saunders*, 92 U. S. 62. After much consideration we have reached the conclusion that the doctrine of that case does not apply here. The transaction which we are now considering was not a contract of purchase and sale in the ordinary sense, but it was a settlement between a trustee and his *cestui que trust*. Allen, as trustee, held certain money and property belonging to complainants; the complainants had received some money and property on account. Upon settlement it was agreed that Allen should hold all in his hands, and complainants should keep what they had themselves. Nothing was actually paid. The complainants kept in their possession what they had previously received. In such a case there was nothing to return, and the reason for prompt rescission and return of the consideration does not exist. It is enough if the party defrauded in such a settlement, upon bringing a suit to set it aside, avers a willingness to be charged with the sum in his hands. It would be an idle and useless proceeding to require him to pay it over to the trustee and immediately decree its return to him. We do not think that the doctrine respecting the rescission of a fraudulent contract upon the discovery of the fraud, and the return of the consideration received by the defrauded party, applies to settlements of accounts between trustee and *cestui que trust* under the circumstances of the present case. See *Eldfelt* v. *Hart*, 1 McCrary, 11.

It may be said that, in order to hold that Allen was a trustee for John P. Cook with respect to the services or

property put into the joint account by the latter, it is necessary to take notice of the provisions of the illegal contract, and that this court cannot do.

A sufficient answer to this suggestion is, that while the illegal contract cannot be enforced or made the basis of relief, there is nothing in the law of evidence, or in the principles of equity, to prevent its being considered as evidence in a case between the parties to it, and as defining their relations to each other with respect to the property acquired under it.

As evidence, the contract may be competent as tending to show the right of plaintiff to recover independently of any contract rights conferred by it.

The result of these views is, that there must be a decree in this case setting aside, as fraudulent and void, the release, assignment and conveyance executed by the executors of John P. Cook, and the said Edward E. Cook individually, to said B. F. Allen of their respective interests in the joint account and property; and for an accounting, to the end that the complainants may recover to the extent of the value of the services rendered and money contributed by John P. Cook to the joint account; and for the purpose of ascertaining the sum to which they are entitled, this case will be referred to a master for such accounting and for report.

A question may arise as to the proper measure of damages.

Can complainants recover upon the basis of the contract, or only for the value of the services, etc., contributed by him to the joint account?

We do not decide this question now, but will direct the master to report the sum that would be due upon such hypothesis, reserving the question until the final hearing.

LOVE, *District Judge*, concurs.

EDWARDS, Trustee, *v.* DAVENPORT *et al.*

(Southern District of Iowa, Central Division. May, 1883.)

1. MORTGAGE — EFFECT OF COVENANTS OF WARRANTY UPON AFTER-ACQUIRED TITLE. — A mortgage containing covenants of general warranty will, as between mortgagor and mortgagee, pass an after-acquired title.
2. SAME — SAME — DEED OF MARRIED WOMAN. — This rule does not apply to such covenants contained in the deed of a married woman, which amount to nothing more than a release of dower, and do not estop her to claim an after-acquired title.
3. CONTRACT — MENTAL CAPACITY. — The more modern rule is, that in order to set aside a contract upon the ground that the party making it was of unsound mind, it is only necessary to show that he was of such weak and feeble mind as to be incapable of comprehending its nature, or of understanding and acting in the ordinary affairs of life.
4. EQUITY — SUBROGATION. — Where one person advances to another money to discharge a valid pre-existing lien upon real estate, the person so advancing such money, if not a mere volunteer, will be subrogated to the rights of the holder of such lien.
5. CONTRACT OF PERSON NON COMPOS MENTIS — NOTICE. — A contract entered into by a person of unsound mind is absolutely void and not merely voidable, and cannot be enforced by showing that the other party to the contract had no notice of the want of mental capacity. *Dexter* v. *Hall*, 15 Wall. 9.
6. DECISION OF SUPREME COURT OF THE STATE — RULE OF PROPERTY. — Where any principle of law establishing a rule of real property has been settled in the state courts, that rule will be applied by the federal courts within the same state, whether it be based upon a construction of a statute or the principles of the common law applied to such titles.
7. SAME — SAME. — Decisions of the supreme court of the state respecting the validity, force and effect of a contract entered into by a person of unsound mind, do not constitute a rule of property, though they may incidentally, in a certain class of cases, affect title to property; and such decisions being in conflict with those of the supreme court of the United States on the same subject, will not be followed in this court, in the present case.
8. SAME — SAME. — The decisions of the highest court of a state may be said to constitute a rule of property, when they relate to and settle some principle of local law directly applicable to titles.

On final hearing.

Bill to foreclose a mortgage executed by respondents George L. Davenport and wife and George A. Davenport, on certain real estate in the city of Davenport, Iowa, to secure the payment of bonds amounting to $95,000 besides interest.

A part of the property mortgaged belonged to George L. Davenport and the remainder to George A.; that belonging to the latter being the south half of block 59 in said city of Davenport. As a part of the contract the debt was apportioned upon the several pieces of real estate mortgaged.

It is conceded that the sum apportioned to and made a lien upon the property of George A. Davenport was $56,000 and interest; and that the sum apportioned to and made a lien upon the property of the said George L. Davenport was $39,000 and interest.

A mortgage was executed to Jonathan Edwards as trustee for the Equitable Trust Company of New London, Connecticut, from which company the said George L. Davenport had obtained a loan of the said sum of $95,000.

No defense is made on behalf of respondent George L. Davenport.

As to the property of George A. Davenport embraced in the mortgage, the defense is that he was, at the time of the execution of the bonds and mortgage sued on, of unsound mind, so that the same are void.

Since the commencement of the suit George A. Davenport has died, and the necessary bill of revivor has been filed, alleging that George L. and Sarah G. Davenport, his father and mother, and who were grantors with him in the mortgage, are his sole heirs at law.

As they had both joined in the general covenants of general warranty contained in the mortgage, it is alleged that their after-acquired title to the property of the said George A., included in the mortgage, accrued to the benefit of the

mortgagees, and that they are estopped to set up the defense above mentioned.

Brannon & Jayne and *J. Carskaddan*, for complainants.

George E. Hubbell, Bills & Block and *Martin, Murphy & Lynch*, for respondents.

McCRARY, *Circuit Judge.*—Upon the death of George A. Davenport, the title to his real estate included in the mortgage passed to his father and mother, George L. Davenport and Sarah G. Davenport, to each an undivided one-half; and as they both joined in the mortgage and in the covenants of general warranty therein, we are to determine, in the first place, how far either or both are estopped to set up the incapacity of George A. to make the contract sued on.

The title acquired by the respondent George L. Davenport through the death of his son, George A. Davenport, undoubtedly inures to the benefit of the mortgagee by virtue of the covenants embraced in the mortgage.

A mortgage containing covenants of general warranty will, as between the mortgagor and mortgagee, pass an after-acquired title. *Rice* v. *Kelso*, 7 N. W. Rep. 341; *S. C.* 10 id. 335; Jones on Mortgages, secs. 561, 682, 825, and numerous cases cited.

But at common law this rule does not apply to covenants contained in the deed of a married woman. They amount to nothing more than a release of dower, and do not estop her to claim an after-acquired interest. Bishop on the Law of Married Women, sec. 603; *Shiles* v. *McChesney*, 20 Iowa, 43. And the same rule prevails under the statute of Iowa, which provides (Code, sec. 1937) as follows:

"In cases where either the husband or wife join in a conveyance of real property owned by the other, the husband or wife so joining shall not be bound by the covenants of

such conveyance, unless it is expressly so stated on the face thereof."

There is upon the face of the mortgage no express statement that the wife shall be bound by the covenants contained therein. *O'Neill* v. *Vanderberg*, 25 Iowa, 104; *Thompson* v. *Merrill*, 10 Fed. Rep. 796.

It follows that, independently of any question as to the mental capacity of George A. Davenport, the complainants are entitled to decree as against all the property embraced in the mortgage and which belonged to George L. Davenport at the time that the mortgage was given, and as to the undivided one-half of that portion which belonged to George A. Davenport.

As to the remaining undivided half of said last mentioned property, the right of complainant depends upon the determination of the question of the mental capacity of said George A. Davenport at the time that the bonds and mortgage were executed.

It is necessary in the first place to determine what is the test by which the question of the capacity to contract is to be decided.

Some of the earlier cases, and a few comparatively recent ones, hold that, in order to set aside a contract upon this ground, it must appear that there was a total deprivation of reason. *Ex parte Barnesley*, 3 Atk. 168; *Stewart* v. *Lispinard*, 26 Wend. 255. The more modern rule is that it is only necessary to show that the party executing the contract was of such weak and feeble mind as to be incapable of comprehending its nature.

The rule is sometimes stated in another form, thus:

"To constitute such unsoundness of mind as should avoid a deed at law, the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life."

This statement of the rule is given in the opinion of the house of lords, in *Ball* v. *Maunnin*, 1 Dow. & Clark, 380,

and is quoted with apparent approval by the supreme court of the United States in *Dexter* v. *Hall*, 15 Wall. 9.

In the former of these cases the court below refused to charge that the unsoundness of mind must amount to idiocy; and this ruling was sustained first by the court of king's bench in Ireland, afterwards by the exchequer chamber, and finally by the house of lords.

The rule is thus stated in *Dennett* v. *Dennett*, 44 N. H. 531: "The question, then, in all cases where incapacity to contract from defect of mind is alleged, is not whether the person's mind is impaired, nor if he is affected by any form of insanity, but whether the powers of his mind have been so far affected by his disease as to render him incapable of transacting business like that in question."

And again: "Every person is to be deemed of unsound mind who has lost his memory and understanding by old age, sickness or other accident, so as to render him incapable of transacting his business and of managing his property.

"When it appears that a grantor had not strength of mind and reason to understand the nature and consequences of his act in making a deed, it may be avoided on the ground of insanity." *Re Baker*, 2 Johns. Ch. 232.

In *Converse* v. *Converse*, 21 Vt. 168, it is said that a person is of unsound mind if "the mind is inert, the memory is unable to recall and the mind to retain in one view all the facts upon which the judgment is to be formed for so long a time as may be required for their due consideration."

I am constrained to hold that within the rule established by these authorities, George A. Davenport was not at the time of signing the bonds and mortgage in question of sound mind, or capable of making a valid contract. That he was not totally bereft of reason may be admitted; but that he was incapable of understanding the nature and consequences of his act in executing these instruments is, I think, equally clear.

The powers of his mind had been so far affected by dis-

ease as to render him incapable of transacting business like that in question.

Without attempting a review of the evidence, an abstract of which covers nearly nine hundred printed pages, it must suffice to say that it shows that he was attacked by a violent disease when about seven years of age, which produced convulsions and a state of unconsciousness, lasting several weeks, and which caused a suspension of mental development from that time, and obliterated from his memory all that he had learned at school prior thereto.

The family physician who attended him testifies that this sickness left him in a state "comparatively idiotic."

A few years later he was attacked with epileptic convulsions, which continued to afflict him and to constantly impair and further weaken his intellect until the day of his death, which occurred in 1881, while an inmate of the insane hospital at Mt. Pleasant, Iowa.

At the time of the execution of the instruments in question he had suffered with this malady for about twenty years.

The effect of epileptic convulsions is always to impair the intellect, and when it is remembered that, after the illness suffered in childhood, George A. Davenport never possessed at his best anything more than the intellect of a child of seven years, it is apparent that this long process of impairment must have left him in a state of such imbecility as to render him utterly incapable of understanding the nature and consequences of his act in executing the bonds and mortgage sued upon.

It is in such cases, of course, impossible to fix the exact point where the disposing mind disappears, and incapacity to contract begins; but here all the facts and circumstances, and the decided weight of the direct testimony, show that in the case of George A. Davenport this point had been reached and passed prior to the date of the instruments sued on. His conduct for years prior to the execution of said instruments, in fact during all the period after his illness in

childhood, was that of a mere child, or of a thoroughly imbecile man. He was never permitted to manage or care for his estate. All his business transactions of any importance were conducted by his father. He was often violent, sometimes dangerously so. Some seventy reputable witnesses who knew him well, testify to such habitual conduct and deportment on his part as would seem to demonstrate the want of capacity to contract; and nearly, if not quite, all of them declare that he was incapable of comprehending the nature and character of the contract embodied in the mortgage and notes sued upon in this case.

It follows that the defense interposed by the respondent Sarah G. Davenport, as to the undivided half of the south half of said block 59, must be sustained except in so far as the money borrowed from the trust company was used to remove valid liens from said property.

To the extent of any such liens actually paid off out of said money, the trust company is entitled to relief. The doctrine of subrogation may well be applied to such a case.

If the money advanced by the trust company was used to discharge a valid pre-existing lien, to that extent the respondent has been benefited. The trust company was not a mere volunteer; and having discharged a valid lien, it is entitled by subrogation to all the remedies which the original holder of such lien possessed as against the property. *Cottrell's Appeal*, 23 Pa. St. 205; *Mosier's Appeal*, 56 id. 80.

It is alleged that the money advanced by the trust company was used to discharge (1) certain mortgages to Richardson, Mrs. Hilton and John Littig, and (2) certain delinquent taxes.

As to these mortgages, I find from the evidence that they were executed to secure the payment of debts of George L. Davenport, and that George A. received no benefit from them; and as they cannot be upheld as contracts binding upon him on account of his want of mental capacity, I cannot hold that they constituted valid liens. As to the taxes it is otherwise. They constituted a valid lien, which was re-

moved with funds obtained from complainants. They were paid on the twenty-eighth day of June, 1875, and the sum paid was $695.10. For one-half of this sum, with six per cent. per annum interest from the date of payment, complainant is entitled to decree against the said undivided half of the south half of block 59, the property of respondent Sarah G. Davenport.

Counsel for complainant have exhaustively argued the question whether it is necessary for the respondents to prove that the trust company had notice of the incapacity of George A. Davenport, and they cite numerous authorities to support the affirmative of this question.

Most of them are cases in which the estate of the lunatic has received the benefit of the contract which is assailed; and it is doubtful whether any well considered case has gone so far as to hold that a contract of suretyship entered into by a person of unsound mind will bind him or his estate, even when the other party to the contract is ignorant of his incapacity and acts in good faith.

However this may be, I must hold that the rule in a case like the present is settled, so far as this court is concerned, by the case of *Dexter* v. *Hall*, *supra*, which decides that such a contract is absolutely void and not merely voidable.

In that case the facts were that Hall, while an inmate of a lunatic asylum in Philadelphia, had executed a power of attorney to one Harris, authorizing him to sell and convey certain real estate belonging to Hall, in San Francisco, California. By virtue of this power, Hall sold the real estate to persons under whom Dexter claimed title. After Hall's death his widow and heirs brought ejectment for the property, on the ground that the power of attorney to Harris was void for want of mental capacity of Hall to execute it.

There was testimony for plaintiff tending to show that Hall was insane at the date of the power of attorney, and on the part of the defendant tending to show that he was

sane. It appears from the statement of the case that "the defendant in rebuttal offered to prove that he had purchased the premises in good faith, for a full consideration, *and without notice of the alleged insanity* of Hall; but the court rejected the testimony."

The court instructed the jury as follows:

"If at the time that Hall executed the power in question he was insane, and his insanity was general, the instrument was a nullity and no title could be transferred under it.

"In that case the plaintiffs are entitled to a verdict.

"It matters not, if such were the case, what consideration may have been paid to the attorney, or with what good faith the parties may have purchased.

"The instrument, in such a case, is no more to be regarded as the act of Hall than if he was dead at the time of its execution."

The jury found for plaintiffs, and the judgment is affirmed by the supreme court in an elaborate opinion by Mr. Justice Strong, in which the authorities are reviewed and the conclusion reached that the ruling and instructions were correct.

"The fundamental idea of a contract," says the court, "is that it requires the assent of two minds.

"But a lunatic, or person *non compos mentis*, has nothing which the law recognizes as a mind; and it would seem, therefore, upon principle, that he cannot make a contract which may have any efficacy as such."

It is suggested by counsel that a different rule prevails in equity, but I know of nothing in authority or reason upon which to base such a distinction.

The rule as to the responsibility of a lunatic or person *non compos mentis*, upon his contracts, is the same in equity as in law; and if this court is bound to follow the ruling in *Dexter* v. *Hall*, it is conclusive of the question now under consideration.

It is insisted, however, that a different doctrine has been established in this state by several decisions of its supreme

court, and that these decisions constitute a rule of property here, which this court should adhere to.

It is true that the supreme court of this state has held that "equity will not interfere to set aside a conveyance on the ground of the insanity of the grantor to one who shall have purchased in good faith, and for value, in ignorance of the mental condition of the grantor." *Ashcraft* v. *De Armond et al.* 44 Iowa, 229. And also that "persons of unsound mind will be bound by their executed contracts, where such contracts are fair and reasonable, and were entered into by the other parties without knowledge of the mental unsoundness, in the ordinary course of business, and where the parties cannot be placed *in statu quo*." *Abbott* v. *Creal et al.* 56 Iowa, 175. And see to the same effect, *Behrenz* v. *McKenzie*, 23 Iowa, 333.

These cases undoubtedly hold a different doctrine from that laid down in *Dexter* v. *Hall;* and the question is, whether they establish a rule relating to land titles within the state of Iowa which this court should follow, notwithstanding a contrary decision by the supreme court of the United States. It is true that where any principle of law, establishing a rule of real property, has been settled in the state courts, that rule will be applied by the federal courts within the same state; and it makes no difference whether such rule of property grows out of the constitution or statutes of the state, or out of the principles of the common law adopted and applied to such titles. *Jackson* v. *Chew*, 12 Wheat. 153.

It may be doubted whether the question here presented is not a question of equity law, and if it is, this court is not bound by the decision of the state court. *Nevins* v. *Scott*, 13 How. 268; *United States* v. *Howland*, 4 Wheat. 115; *Boyle* v. *Zacharie*, 6 Pet. 658. But waiving the consideration of that question, I am of the opinion that the decisions of the supreme court of Iowa above cited do not establish a rule concerning land titles. They relate not to land titles

especially, but to a question of general jurisprudence, to wit: The effect to be given to the contract of a lunatic or person *non compos mentis*. It is true that the doctrine announced in these cases may, when applied to conveyances, affect titles to land in this state; but it is only necessary in the present case to determine the validity of the bonds executed by George A. Davenport. If these are held invalid as to him, the mortgage, which is a mere incident, falls with them. Can it be said that a rule respecting the validity, force and effect of a contract entered into by a person of unsound mind is a rule of property? It is a rule which may indirectly, in a certain class of cases, affect title to property; but the same may be said of any ruling of the state courts respecting contracts.

If the sum claimed as due upon a contract is sought to be fastened as a lien upon real estate, either by mortgage or attachment, a decision of the question of its validity will undoubtedly affect the title to such property. But it has never been claimed that for this reason the decisions of state courts upon the validity of any class of contracts can be regarded as a rule of property.

If the complainant had sued at law upon the bonds, it would not have been claimed that the state decisions in question were binding on this court.

It is difficult to see upon what principle we can apply one rule to the bonds when suit is brought upon them at law, and another when suit is brought upon them in equity.

The decisions of the highest court of a state may be said to constitute a rule of property when they relate to and settle some principle of local law directly applicable to titles.

A rule of property is one thing; a rule respecting the validity of a class of contracts which may or may not affect titles to property, is another and a different thing.

It has been held that the federal courts are not bound by the decisions of the state courts determining whether an instrument is a promissory note (*Bradley* v. *Lill*, 4 Biss. 473),

and I suppose it would make no difference if such an instrument were secured by mortgage. The federal courts would still maintain the right to decide for themselves all questions as to its validity and its force and effect, except such as are determined by local statute.

Again, let us suppose that the state courts establish a rule respecting the right of purchasers and assignees of negotiable paper, which is contrary to a rule upon the same subject established by the supreme court of the United States.

It is well settled as a general proposition, that this being a rule of general commercial law, the federal courts decide upon it for themselves. Would the rule be otherwise in a case where such an instrument happens to be secured by a mortgage?

The case of *Thomas* v. *Hatch*, 3 Sumner, 170, is instructive upon the question what is to be understood by the phrase, "rule of property." The case turned largely upon the construction of a deed.

The supreme court of the state (Maine) had in another case construed the same instrument; but Mr. Justice Story refused to adopt that construction, saying:

"If this were a question of purely local law, we should not hesitate to follow the decision of that learned court, for which we entertain the greatest respect. But the interpretation of a deed of this sort is in no just sense a part of the local law. It must be interpreted everywhere in the same manner; that is to say, according to the force of the language used by the grantor and the apparent intentions of the parties deducible therefrom."

My conclusion upon this branch of the case is that the question whether a contract entered into by a lunatic or person of unsound mind is absolutely void, or only voidable, in case the other party can be charged with notice of the want of mental capacity, is a question of general jurisprudence, to be determined by general principles of law applicable alike to all the states; and that therefore this court is

bound to follow the decision of the supreme court of the United States in deciding it. It follows, from these considerations, that there must be decree for complainant against George L. Davenport for the whole amount of the bonds sued on, with interest and costs; and as against all of the respondents for the foreclosure of the mortgage sued on, as against all the property except the undivided half of the south half of block 59, in the city of Davenport, Iowa; and as against respondent Sarah G. Davenport, to be enforced as a lien upon said last mentioned property, a decree for one-half of the sum paid to remove the tax lien upon said half block, and six per cent. interest thereon from the time of payment.

ANTELOPE COUNTY *v.* THE C., B. & Q. RAILROAD COMPANY.

(District of Nebraska. May, 1883.)

1. CORPORATION — CONSOLIDATION — CITIZENSHIP. — Where two corporations existing in different states are in accordance with law consolidated into one by the sale of the franchises and property of one corporation to the other, the latter becomes the one consolidated company, and its citizenship is to be considered in determining the right of the consolidated company to sue in the federal court. *Held*, accordingly, that the Chicago, Burlington & Quincy Railroad Company, formed by consolidation of the Burlington & Missouri River Railroad Company in Nebraska with the former company, is an Illinois corporation.

MCCRARY, *Circuit Judge.*— This case is before the court on a plea in abatement raising the question whether the defendant is a corporation of Nebraska. The essential facts are as follows:

1. The Chicago, Burlington & Quincy Railroad Company was originally created a corporation of the state of Illinois under the laws of that state.

2. Afterwards said corporation was consolidated with the

Burlington & Missouri River Railroad Company of Iowa, and thereby became the owner of a line of railway extending across that state from the Mississippi to the Missouri river, which has for a number of years been operated as a part of the C., B. & Q. Railroad, and as part of a through line from Chicago, Illinois, to the Missouri river.

This consolidated company appears to have been regarded in the courts of Iowa as an Illinois corporation.

3. On the first of January, 1880, the said Chicago, Burlington & Quincy Railroad Company and the Burlington & Missouri River Railroad Company in Nebraska, the latter being a corporation of Nebraska, entered into articles of consolidation. These articles provide "That for the purpose of consolidating the stock, property and franchises of the parties hereto, and of making of said corporations one joint stock company, which, as the lines of railroad of the respective parties hereto connect at the boundary line between the states of Iowa and Nebraska, may be done under the laws of said states, and the contract aforesaid, it is agreed as follows, that is to say:

"ARTICLE I.

"Such consolidation should be effected by a sale, assignment and transfer, which is hereby made, of the railroad, leaseholds, rights and rights of action, contracts, moneys, stocks, franchises, and all other property of every nature and description whatsoever of the second party, to the first party, the Chicago, Burlington & Quincy Railroad Company." In pursuance of this contract a formal conveyance of all the property of the Burlington & Missouri River Railroad Company in Nebraska was duly executed to the Chicago, Burlington & Quincy Railroad Company.

4. A statute of Nebraska provides that "every railroad company shall have power to intersect, join and unite their railroads constructed or to be constructed in this state or in adjoining states and territories, at such point on the bound-

ary line of each, or at such other point as may be mutually agreed upon by said companies. And such railroads are authorized to merge and consolidate the stock of the respective companies, making one joint stock company of the railroads thus connected, upon such terms as may by them be mutually agreed upon, in accordance with the laws of the adjoining state or territory with whose road or roads connections are thus formed; *provided*, that the consent of three-fourths of all the stockholders in amount in any road whose stock is proposed to be consolidated shall be obtained." It is admitted that the required assent of stockholders was obtained, and the question is whether these articles of consolidation, and the conveyance by the Nebraska corporation of all its property and franchises to the C., B. & Q. Railroad Company, makes the latter a domestic corporation. The same individuals may constitute separate and distinct corporations, either under the same or different names, in each of several states. It is also true that it is competent for the legislature of the state to prescribe the terms and conditions upon which foreign corporations shall have the right to engage in business in the state, and may require all such to become domestic corporations, if it sees fit to do so. *Stout* v. *R. Co.* 3 McCrary, 1. But it is clear that the legislature of Nebraska has not seen fit to require that a foreign corporation which has constructed a railroad to the boundary line of the state shall become a corporation of Nebraska before it shall be permitted to consolidate with a Nebraska corporation.

The statute permitted the two corporations in question "to merge and consolidate the stock of the respective companies, making one joint stock company of the railroads thus connected." It seems that the purpose of the legislature was not to provide for a continuance of both corporations, and it is scarcely to be presumed that there was any purpose to require a dissolution of the Illinois corporation, as that would have been quite beyond the scope of its powers. How, then, was the consolidation of the two companies into one to be

accomplished? The answer is to be found in the words of the statutes, "upon such terms as may by them be mutually agreed upon in accordance with the laws of the adjoining state or territory with whose road or roads connections are thus formed." The consolidation here was by sale of the Nebraska road, with all its property and franchises, to the Illinois corporation, and if there is to be but one consolidated company, the intention must have been to make the Illinois company that one. Was this unlawful? Clearly not, unless it violated some law either of Nebraska, Iowa or Illinois. The statutes of Iowa expressly authorize consolidation by sale. I assume, as nothing appears to the contrary, that no provision of any law of Illinois has been violated. There is nothing in the above quoted statutes of Nebraska to prevent a consolidation by the sale of a domestic road to a foreign corporation which has built a line of railroad to the state boundary. On the contrary, the parties are expressly empowered to fix their own terms of consolidation, subject only to the condition that they shall not violate any law of the other state or states interested.

The true rule upon the subject is, that where the state does not assume by its legislation to create a corporation, or to require a foreign corporation to become domestic, but recognizes the existence of such foreign corporation and its right to come into the state and transact business therein, such foreign corporation remains a corporation of the state under whose laws it was created, and, for purposes of the jurisdiction of the federal courts, a citizen of that state. *M., K. & T. R'y Co.* v. *T. & St. L. R'y Co.* 10 Fed. Rep. 497. Within this rule I hold that the defendant is an Illinois corporation.

The plea to the jurisdiction is accordingly overruled.

Mr. Munger, for plaintiff.

Mr. Marquett, for defendant.

BEACH *v.* MOSGROVE.

(District of Nebraska. May, 1883.)

1. SERVICE BY PUBLICATION — EFFECT OF JUDGMENT UNDER. — The effect of an adjudication based upon service by publication, under the eighth section of the act of congress of March 3, 1875, is limited, as regards the absent defendant or defendants, without appearance, to the property which shall have been the subject of the suit and under the jurisdiction of the court; as to any other property or rights of the absent defendants, it is null and void.
2. BILL IN EQUITY — DEFAULT — PROOF. — It is error to render judgment upon the unanswered allegations of a bill in equity, without proof, upon service by publication only, and without appearance. A failure to deny the allegations of the bill is not a sufficient admission of those allegations to authorize a decree in accordance therewith.
3. BILL OF REVIEW, WHEN TO BE FILED. — The general rule is that a bill of review for errors apparent upon the face of the record must be filed within the time for taking an appeal, which in a case like the present would be two years.
4. SAME — SAME — SERVICE BY PUBLICATION. — Where service was made upon the defendants by publication, and where said defendants had, under the statute, one year after final decree in which to enter their appearance and have the decree set aside, with leave to them to defend, the decree was not final as to the absent defendants until the expiration of one year after it was entered. So long as a party has a right to apply for the correction of errors to a court of original jurisdiction, he cannot invoke the powers of an appellate tribunal for that purpose.

On demurrer to bill of review.

This is a bill filed to review and modify the decree rendered by this court in the case of *Cornelia O. Harrington* v. *John B. Finley et al.*

The original bill was brought for the double purpose of removing from the title to certain lands a cloud thereon caused by certain tax deeds, and of cancelling a certain mortgage thereon alleged to have been paid in full. The present complainants were interested in the mortgage. Their true names are Wm. M. Beach, John N. Beach and James T. Black. Among the defendants in the original suit

are found the names of James T. Black, W. M. Black and John T. Beach, but not that of Wm. M. Beach or John N. Beach.

The mortgage appears to have been executed to James T. Black, but to secure three notes payable to these complainants jointly.

There was service by publication under the law of the state, while the cause was pending in the state court and prior to its removal. These complainants did not appear. No proof was adduced to show payment of the mortgage debt. The decree was by default as to these complainants, and directed that the mortgage be canceled. These facts appear upon the face of the record and are alleged in the bill of review, which alleges in addition that the mortgage debt has never been paid, and prays that the original decree be set aside as to them as erroneous. Respondents demur to the bill of review.

E. F. Warren, for demurrer.

S. H. Calhoun, contra.

McCrary, *Circuit Judge.*—My conclusions are as follows:

1. The original bill was filed for the purpose in part of procuring a decree for the cancellation of a certain mortgage securing the payment of three promissory notes which were payable jointly to the complainants herein, including Wm. M. Beach, who was not made a party to the bill. As to him, clearly the decree is void for want of jurisdiction. Although he was not named as a grantee in the mortgage, he was named as a payee of the notes secured thereby; and it is very clear that in a suit brought to cancel a mortgage upon the ground that the mortgage debt is paid, all the holders of any portion of such debt, so far at least as they can be found, are necessary parties. If the debt is divided into parts, and negotiable notes executed to different persons therefor, it is apparent that the holder of each note, whether named in the

granting clause of the mortgage or not, is in equity a part owner of the mortgage and entitled to foreclose. If such notes be transferred from hand to hand, it is well settled that the mortgage security goes with them. The mortgage is a mere incident to the notes.

Beyond all doubt, then, Wm. M. Beach was entitled to a hearing before any valid decree could be rendered declaring his note paid and his mortgage lien discharged, and the decree as to him is a nullity upon the ground that the court had no jurisdiction over either his person or his property, and without considering any other ground.

As to the other complainants who were made defendants to the original bill, a different question arises. They were served by publication only, under the law of the state, while the original cause was pending in the state court, and they made no appearance. A question has been suggested as to whether we are to give to this service by publication the same force and effect that it would have had if the case had not been removed to this court, but had gone to decree in the state court; but in the view I have taken of the case, this question is not important. I assume that the force and effect of the final decree, and all questions as to its validity based upon the fact that the defendants and their property were beyond the jurisdiction, must be determined by the provisions of the federal statutes. The governing statute in such cases is the eighth section of the act of congress of March 3, 1875, which provides for service by publication upon absent defendants in suit, "to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought." The effect of an adjudication based upon such service is thus limited and defined: "But said adjudication shall, as regards said absent defendant or defendants, without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court

therein within such district." The original bill averred that the notes secured by the mortgage had all been paid in full, and therefore prayed a decree to cancel the mortgage. What was the property which constitutes the subject matter of this suit? Was it the land upon which the mortgage rested, or the notes held by these complainants? It is a question of some nicety whether the complainants' property was not in the notes. That they had a property in the notes which was the subject matter of the suit is quite clear, for the effect of the decree is to cancel the notes as well as the mortgage. The notes were not within the district, and as to them the decree is void for want of jurisdiction. As to both notes and mortgage, it is clearly erroneous because it was rendered without proof, upon service by publication only, and without an appearance. The only evidence was the allegations of the bill. The better rule is, especially in cases where the service is by publication, that a failure to deny the allegations of the bill is not a sufficient admission of those allegations to authorize a decree in accordance therewith. *Rogers* v. *Marshall*, 3 McCrary, and cases cited.

The decree, in so far as it relates to the rights of the present complainants, being at least erroneous because of the facts apparent upon the face of the record, it is clear that it must be set aside so far as those rights are concerned, unless it has been filed too late.

The general rule is, that a bill of review for errors apparent upon the face of the record must be filed within the time allowed for taking an appeal, which in a case like this would be two years.

Applying that rule strictly, it would appear that the present bill was filed four days after the expiration of the time. But the rule is not so inflexible as to bar relief in the present case. Here service was made by publication; the respondents did not appear; they had under the statutes above cited one year after final decree in which to enter their appearance and have the decree set aside with leave to them

to defend. I am not prepared to hold that it is the duty of a court of equity to apply the two years' limitation with exactness to such a case. The decree was not final as to the absent defendants until the expiration of one year after it was entered.

They were joint payees of the notes, and one of them was not made a party. As to him, the decree was not only erroneous, but absolutely void. As to the others, I think upon sound equitable principles they were entitled to two years from the time when the decree became final as against them, in which to file their bill of review. They are within this rule, as the decree did not become final as against them until the expiration of one year from the date of its rendition. If within that period they had taken an appeal, they would in all probability have been told by the supreme court that it was their duty to apply to the court below for leave to come in and defend. I suppose it to be well settled upon principle and authority, that so long as a party has a right to apply for the correction of errors to a court of original jurisdiction, he cannot invoke the powers of an appellate tribunal for that purpose. It follows that, in any view of this case, the bill of review is filed in due time. The demurrer must be overruled.

The facts to which I have referred as controlling in the determination of this question all appear upon the face of the record, and I suppose there will be no disposition to controvert them.

If there is not, the order will be that so much of the original decree as finds that the mortgage of these complainants has been paid in full, and directs that the same be canceled, be set aside, and that these complainants have leave to appear in that case and make any defense as to their rights under the mortgage that they might have made had they appeared and been heard in the original suit. The question whether the respondent Phoebe Rebecca Elizabeth Elvina Linton, the purchaser at the marshal's sale, is an innocent purchaser

without notice, for value, and entitled as such to protection against any claim of these complainants, will be reserved for determination on the final hearing.

ARGALL *v.* SEYMOUR *et al.*
BIERMAN, HEIDELBERG & CO. *v.* SAME.

(Southern District of Iowa, Central Division. May, 1883.)

1. CHATTEL MORTGAGE — RETENTION OF POSSESSION BY MORTGAGOR WITH POWER TO DEAL WITH THE PROPERTY.— A mortgage of chattels which provides that the mortgagor may retain possession of the property, and continue to deal with it as his own, selling therefrom from time to time, is at least constructively fraudulent as to creditors, and therefore void; and the same result follows where such a mortgage does not upon its face provide for the retention of possession by the mortgagor, and that he may continue to deal with the property as his own, but where it is shown by proof that such was the understanding of the parties, and that the mortgagor did in fact retain possession of the goods, and continue to deal with them as his own by selling portions thereof, etc.
2. SAME — SAME — SUBSEQUENT DELIVERY TO MORTGAGEE.— Where a mortgage of chattels makes no provision authorizing the mortgagor to continue in possession, and to deal with the property mortgaged, and the mortgagee delays for a brief period to take possession under it, and permits the mortgagor during that period to deal with it as his own, this of itself, in the absence of proof of actual and intentional fraud, will not render the mortgage void in law. It may be held good if possession be delivered before any rights of third parties have intervened; that is, from the time of such delivery it may be held to be as valid as if executed at the date of such delivery.
3. RIGHTS OF INNOCENT THIRD PARTIES.— As to persons who deal with the mortgagor after the execution of the mortgage, and before its recording, and while the possession remains with the mortgagor, the court holds that they may be treated as having dealt upon the faith of his ownership of the goods, he being then in possession. *Crook's Assignee* v. *Stewart et al.* 2 McCrary, 13.

MCCRARY, *Circuit Judge (orally).*— These cases are before me, having been submitted upon the answer of the gar-

nishee and other testimony taken upon the issue joined thereon, by stipulation of counsel jury being waived.

The proceeding is against one Toy as garnishee; and the claim of the plaintiffs in the several cases — I believe there are a number of them, all to be determined by the ruling upon these two — is, that Toy as garnishee is responsible to certain judgment creditors of A. W. Seymour for the value of the stock of goods which Mr. Toy took under a chattel mortgage and caused to be sold, receiving the proceeds.

Seymour was a merchant in the town of Alta, in the northern part of this state, carrying on a retail establishment. Being indebted to Mr. Toy for money advanced by Toy to him in order to enable him to pay certain debts, he executed a chattel mortgage upon his stock of goods. The mortgage was dated on the thirtieth of September, 1881. It was not filed for record until the third of November, 1881, a period of about thirty days. Possession was not taken until the twelfth of December, 1881. During the period from the time of the execution of the mortgage until the time when possession was taken, the mortgagor, Seymour, remained in possession of the stock of goods, and continued to deal with it, making sales therefrom in the ordinary course of business. There was no provision in the mortgage authorizing him to retain possession and continue to make sales; but he did so with the consent, undoubtedly, of the mortgagee, and that was the understanding and purpose, as clearly appeared in the proof. The claims of these plaintiffs, with one exception to which I shall presently refer, all, so far as I am advised, ante-dated the execution of the mortgage. In other words, none of them, with the exception to be noted, contracted with the mortgagor after the execution of the mortgage and before its record.

The rule laid down in the case of *Robinson* v. *Elliot*, 22 Wall. 523, is recognized as establishing this proposition: A mortgage of chattels which provides that the mortgagor may retain possession of the property and continue to deal

with it as his own by selling therefrom from time to time, is at least constructively fraudulent as to creditors, and therefore void. That case went no further than that. It held that where the mortgage itself by its own terms provided that the mortgagor should retain possession and continue to deal with the property as his own, it was constructively fraudulent and void. But I am of opinion that another proposition necessarily follows, and that is this: That where such a mortgage does not upon its face provide for the retention of possession by the mortgagor, and that he may continue to deal with the property as his own, yet, if it be shown by proof that such was the understanding of the parties, and that the mortgagor did in fact retain possession of the goods and continue to deal with them as his own by selling portions thereof, etc., the same result follows, and the mortgage must be held void. That is to say, it is not a question as to the nature of the proof by which the character of the transaction is to be established, but it is a question as to the fact itself, as to the nature of the transaction itself. This may be shown by the terms and stipulations of the mortgage. It was so shown in the case of *Robinson* v. *Elliot*. And it may also appear by evidence *aliunde* the mortgage; and if it is established as a fact in either mode, the same result must follow.

But there is another question here, and that is this: Whether in a case where the mortgage is silent upon the question of possession, and makes no provision authorizing the mortgagor to continue to deal with the property mortgaged, and the mortgagee delays for a brief period to take possession under it, and permits the mortgagor during that period to deal with it as his own, this itself, in the absence of proof of actual or intentional fraud, will render the mortgage void in law.

This question is not settled by the case of *Robinson* v. *Elliot*, because there the possession had continued for more than two years in the mortgagor after the execution of the

mortgage, and during all that time he had continued to deal with the property as his own, being authorized so to do by the express terms of the mortgage itself. In the present case the possession of the mortgagor was continued only about sixty days, and I am not prepared to say that we must necessarily hold the mortgage to be fraudulent alone because the mortgagee delays to take possession for a period of time such as that, and no longer than that. I think if there is no proof of actual fraud, or of an intent to cover up the property for the purpose of hindering other creditors, and if possession be delivered before any rights of third parties have intervened, that from the time of such delivery it may be held to be as valid as if executed at the date of such delivery. As to persons who deal with the mortgagor after the execution of the mortgage, and before its recording, I am of opinion that they may be treated as having dealt upon the faith of his ownership of the goods, he being then in possession. In other words, I adhere to what was said in the case of *Crook's Assignee* v. *Stewart*, reported in 2 McCrary, 13.

The doctrine laid down in *Robinson* v. *Elliot* has never been extended so far as to render void absolutely a transaction such as that shown by the evidence in this case; and the courts do not seem inclined to extend the doctrine of that case further than its facts require. See *Brett* v. *Carter*, 2 Lowell, 458; *Miller* v. *Jones*, 25 N. B. R. 250.

The mortgage I am considering contained a provision authorizing the mortgagee to take possession at any time. There is some proof tending to show that he abstained for a time from doing so in consequence of a promise of the mortgagor to apply the proceeds of sales to the payment of the mortgage debt. The case is therefore, in several respects, unlike that of *Robinson* v. *Elliot*.

These propositions being decided, counsel can determine as to how far they affect the several cases growing out of this transaction.

I am prepared to say that as to the plaintiffs here in one

of these cases, the case of Bierman, Heidelberg & Co., the proof shows that they dealt with Seymour after the execution and before the recording of the chattel mortgage, upon the faith of his ownership of the stock of goods, and that therefore the mortgage as to them must be held to be void. They dealt with Seymour while he was in possession of the goods. True, their debt had been previously contracted; but on the second of November the time for payment was extended and a new note was taken. At that date Seymour was in possession of the stock of goods, and there was no recorded lien thereon.

Following the decision of this court in *Crook's Assignee* v. *Stewart*, I must hold that as to them the mortgage is void, and that they are entitled to judgment against the garnishee accordingly.

Shippen *v.* Bowen.

(District of Colorado. February, 1883.)

1. Action of Deceit — Scienter — Tort.— Where a party elects to sue another for tort only, he must aver and prove an intent to wrong or injure, or such negligence or other misconduct as necessarily implied such wrong or injury. A *scienter* is the very gist of a tort. Otherwise if he sues upon an implied warranty of the genuineness of negotiable paper.

On motion for new trial.

McCrary, *Circuit Judge.*— Although this case was tried before the district judge, at his request and with the consent of the parties, the motion for a new trial has been submitted to me. It is an action *ex delicto* in the usual form of a declaration for deceit. The complaint charges that, to induce plaintiff to purchase certain bonds, the defendant represented that they were genuine and valid bonds, whereas, in truth and in fact, they were worthless forgeries. The court

charged the jury that it was necessary for plaintiff to show that the defendant, at the time of the sale of the bonds to plaintiff, misrepresented the facts concerning their genuineness. In other words, the court was of the opinion, and so charged the jury, that plaintiff could not recover in this action by merely proving a sale of the bonds to him by defendant, and that the bonds were forgeries. It was held to be necessary to prove knowledge on the part of the defendant of the forged character of the bonds, or an express misrepresentation concerning the fact of their genuineness. The counsel for plaintiff insists that in such a case as this no *scienter* need be alleged, nor, if alleged, need be proved. I am unable to concur in the soundness of this proposition. The contention of the plaintiff's counsel is, that because the mere sale of the bonds rendered the seller liable upon an implied warranty of their genuineness, that he is equally liable for an implied tort. But this argument fails to note the distinction between an action upon an implied contract of warranty of the genuineness of the bonds sold, and an action for deceit or misrepresentation sounding in tort. It is impossible to conceive the idea of a tort as separate and apart from an intentional wrong or injury, or such negligence or other misconduct as necessarily to imply such wrong or injury. A *scienter* is the very gist of a tort. To say that one may recover in tort without proving a *scienter*, is to say that he may omit from his proof the chief element of his case. No doubt there may be cases of express warranty upon which an action of tort may be founded. Of such a character was the case of *Schuchardt* v. *Allens*, cited by the plaintiff's counsel, reported in 2 Wall. at p. 359. That was an action for false warranty of the quality of personal property sold by the defendant to the plaintiff; and it was held to be enough for the plaintiff to prove the warranty, and that it was false, without proof of a *scienter*. There are doubtless numerous cases to be found in the books in which it is asserted that the holder of negotiable paper, by the mere

fact of offering it for sale, confirms its genuineness, and represents that it is duly executed, as it purports to be. But this is not the sort of confirmation or misrepresentation that amounts to a tort. It is a misrepresentation within the meaning of the law of contracts; and in the purview of that law it is immaterial whether it be true or false, because there is an implied contract. It is not, however, a false representation within the meaning of the law of torts, upon which an action *ex delicto* can be maintained. I do not think that any of the cases cited by plaintiff's counsel support the proposition that it is not necessary to prove intent to injure or defraud in such a case as the one now under consideration. A party cannot be guilty of a tort, within the proper signification of that term, who is innocent of all intent to injure or defraud. If the present plaintiff, after his purchase of the bonds in question from defendant, and in perfect ignorance of their fraudulent character, believing them to be valid and genuine, had in good faith sold them to a third party, he would have been liable upon the contract because of the warranty of genuineness which the law implies, but not, in my judgment, in tort, for having knowingly, intentionally and wilfully injured and defrauded the party to whom he sold.

Such being my view of the law, the motion for a new trial must be overruled, and it is so ordered.

GRAMES *v.* HAWLEY.

(District of Kansas. February, 1883.)

1. JUDGMENT — POWER OF COURT AFTER THE TERM. — No court can reverse or annul its own final decrees or judgments for errors of fact or law, after the term at which they have been rendered, unless for clerical mistakes. An order finally dismissing or discontinuing a cause, in pursuance of the agreement of compromise and settlement between the parties, is in the nature of a final order disposing of the case.

2. SAME — SAME — FRAUD. — A judgment can no more be set aside upon motion after the term upon the ground of fraud than upon any other ground. A hearing upon proper notice upon that question is the right of the party charged with the fraud.
3. SAME — JURISDICTION. — At the end of the term at which there is a final disposition of the case, the parties are dismissed *sine die*, and may then discharge their attorneys with the assurance that the controversy is at an end, and can be renewed only by proceedings in the nature of error or appeal.
4. ATTORNEY AND CLIENT — CONTINUANCE OF RELATION AFTER END OF LITIGATION — PRESUMPTION. — There is no presumption of law that the relation of attorney and client continues after the termination of the litigation, and after the final adjournment of the term at which the final judgment is rendered. A party who relies upon service made upon an attorney after final judgment, and after the end of the term, unless it be service of citation, or other process in the nature of appeal, must take the chances of showing that at the time of such service the relation actually existed.
5. SAME — RULE APPLIED. — This rule is especially applicable to cases like the present in which a party is sued in a foreign state, and after having settled the case, and seen that a record of final dismissal was entered, and that the court had adjourned *sine die*, has settled with and paid his attorney, and departed for his home a thousand miles distant.
6. NOTICE TO ATTORNEY. — Notice to a former attorney after the relation of client and attorney has long been ended, so far as it is possible for the parties to end it, is not notice to the client by which he is bound.

Action at law upon transcript of a judgment in favor of plaintiff and against defendant for $3,835.29 and costs, rendered September 22, 1878, by the supreme court of New York in and for the county of Steuben. The defense is that the judgment is void because the court by which it was rendered had no jurisdiction of the defendant. The facts upon which this defense is based are as follows:

Plaintiff is a citizen of New York and defendant a citizen of Kansas. In 1873, while defendant was temporarily in New York, the plaintiff sued him to recover damages for an alleged fraud in the sale of certain lands. Process was served on defendant, and he was also at the instance of plaint-

iff arrested and confined in prison. While defendant was so confined and pending the suit, a written agreement of compromise and settlement was entered into, whereby defendant agreed to and did execute to plaintiff a mortgage on his homestead in Kansas for $2,000, and the plaintiff agreed to and did dismiss the suit. Prior to this settlement, one W. W. Oxx had appeared as counsel for defendant in the cause. After the settlement, and the same being shown to the court, an order of dismissal dated January 8, 1876, was entered of record in the case. Thereupon the defendant paid off his counsel, Mr. Oxx, discharged him from his service and returned to Kansas. On the twenty-ninth day of August, 1878, more than two years after the order of dismissal, and after the close of the term at which that order had been entered, plaintiff filed a motion to set the same aside on the ground that it had been procured by fraud, and to restore the case to the calendar of the court for trial. Notice of this motion was served upon Oxx as counsel for defendant, but he refused to appear. The court sustained the motion, no one appearing to resist it, ordered the case to be restored to the calendar, proceeded to try it, and rendered judgment as above stated. It is upon this judgment that suit is now brought.

William Littlefield and *S. O. Thacher*, for plaintiff.

John W. Deford and *A. W. Benson*, for defendant.

McCrary, *Circuit Judge.*— 1. The order of discontinuance made by the court in pursuance of the agreement of compromise and settlement was in the nature of a final order disposing of the case. Whatever power the court may have had over the case and the parties after that order was made and during the same term, I am of the opinion that after the term it had no power to set the same aside on motion. The power of the court over the action and over the parties to it

had been exhausted by the final adjournment of the term at which the final order of dismissal was entered, and it could not resume jurisdiction either over the subject matter or the parties without a new proceeding, and the service therein of the ordinary original process. *Cameron* v. *McRoberts*, 3 Wheat. 591; *Bank* v. *Moss*, 6 How. 31; *Ex parte Sibbald* v. *United States*, 12 Pet. 811; *Assignees* v. *Dorsey*, 2 Wash. 433; *Becker* v. *Sauter*, 89 Ill. 596; *Jackson* v. *Ashton*, 10 Pet. 480.

The rule is thus stated in *Ex parte Sibbald* v. *United States:*

"No principle is better settled or of more universal application than that no court can reverse or annul its own final decrees or judgments for errors of fact or law after the term at which they have been rendered, unless for clerical mistakes."

And in *Jackson* v. *Ashton* the court said:

"We have no power over the decrees rendered by this court after the term has passed and the cause has been dismissed or otherwise finally disposed of."

The fact that fraud in the settlement of this suit is charged in no manner affects the question of jurisdiction or the mode of acquiring it. A judgment can no more be set aside upon motion after the term upon the ground of fraud, than upon any other ground. A hearing upon proper notice upon that question is the right of the party charged with the fraud. We cannot assume the truth of the charge for the purpose of affecting the decision of the question of jurisdiction. What we are now to consider is, whether the New York court had jurisdiction of the defendant for the purpose of trying the question of fraud. And the rule governing the decision of this question of jurisdiction is, that at the end of the term at which there is a final disposition of a case (final in the sense that, if not appealed from, it ends the controversy) the parties are dismissed *sine die*. If they are citizens of foreign states, they may safely depart for their homes. If they had employed an attorney, they may then discharge

him with the assurance that the controversy is at an end, and can be renewed only by proceedings in the nature of error or appeal, and that, except in the event of such proceedings, no valid service of process can be made upon the attorney. Such is the doctrine recognized by the federal courts, and it has peculiar force in all cases where parties are compelled to litigate in foreign tribunals. There is no presumption of law that the relation of attorney and client continues after the termination of the litigation and after the final adjournment of the term at which a final judgment is rendered. Weeks on Attorneys, 425, 426. And it is but fair and reasonable,—especially in cases like the present—to hold that a party who relies upon service made upon an attorney after final judgment and after the end of the term (unless it be service of a citation or other process in the nature of error or appeal), must take the chances of showing that at the time of such service the relation actually existed. Even if it could be shown that a different rule prevails with respect to suits between citizens of the same state in some state courts, I should not be inclined to apply it here. That it might lead to great injustice is very apparent when we look at the circumstances of this case. The defendant had been sued in a foreign state, a thousand miles from his home. He had been thrown into prison. He employed counsel from the necessities of his situation. His case was settled. He was released from imprisonment, and thereupon paid off and discharged his attorney, and returned to his home in Kansas. Must he hold himself in readiness to return to New York and renew the litigation upon motion of his antagonist and notice to his former attorney upon an allegation that the settlement was fraudulent? If so, for how long? Certainly not for two years. Certainly not for any period beyond the end of the term, if until that time. To hold him bound for two years to answer to any motion thus made, would be in effect to compel him to have an attorney in a foreign state during that period, whether he will or not. The consequences

of being sued in a foreign jurisdiction are serious enough without adding this unusual and unreasonable requirement.

2. I am also of the opinion that even if after the term it had been competent for the court, upon motion, to set aside the order of discontinuance, notice to the former attorney of defendant was not notice to him. The relation of attorney and client had long been ended so far as it was possible for the parties to end it. It was possible for them to end it for all purposes except the service of such process as was necessary to the exercise of the appellate jurisdiction of the courts of the state of New York. A motion to set aside a judgment for fraud after the term has in it all the elements of a bill in chancery. It is in its nature an original proceeding. It is not a part of the original suit, and therefore service upon the defendant is necessary.

As the court which rendered the judgment had no jurisdiction, its proceedings are without force or validity, and the question is properly raised here.

Judgment for defendant for costs.

WARE *v.* WISNER.

(District of Iowa, Central Division. February, 1883.)

1. WILL — REAL ESTATE — LEX REI SITÆ. — The validity of a will conveying real estate is to be determined by the law of the place where the land lies.
2. REVOCATION — BIRTH OF HEIR. — By the law of Iowa a will is revoked by the birth of an heir after its execution.
3. PROBATE OF WILL — EFFECT OF. — The probate of a will, while it settles the question of due execution, does not establish its validity, or determine its force and effect upon titles to real estate claimed under it.
4. RIGHT OF NON-RESIDENT ALIENS UNDER THE LAWS OF IOWA. — It is the settled law of Iowa that non-resident aliens could not inherit under the statute of that state in force in 1859.
5. MARRIED WOMAN — CITIZENSHIP. — A non-resident alien woman who marries a citizen of the United States is capable of inheriting by

reason of the citizenship of her husband. Persons born of parents who are citizens of the United States are citizens by birth.

6. CITIZENSHIP — EXPATRIATION. — Persons born of parents who are citizens of the United States, and who never renounced their citizenship, within the rule laid down in *Talbot* v. *Jansen*, Dallas, 133, have not ceased to be citizens of the United States within the doctrine of expatriation.

This is a bill in equity, brought to quiet title to twelve hundred and eighty-eight acres of land located in Franklin county, Iowa. Said land was entered by Asahel Gage, who was a non-resident alien residing in Canada. Patents were issued to him, and he held title until his death, which occurred July 1, 1861. He left surviving him eleven children, two of whom have since died. At the time of his death, it is conceded that two of his children, John M. Gage and James D. Gage, resided in Iowa, and were citizens of the United States. It is also conceded that all the remaining children, except two, were at the time of the death of said Asahel Gage, and still are, non-resident aliens. The two children about whom a question is made are two daughters, Sarah and Elizabeth, who married two brothers, named Cummings, whose parents were native-born citizens of the United States who had emigrated to Canada, but who had never formally renounced their allegiance to this government. The sons were born in Canada, but never formally renounced their allegiance to this government. Both the father and the sons, however, engaged in business in Canada, and several times voted there upon their property qualifications, as provided by law. The father always refused to take the oath of allegiance to the government of Great Britain. The complainant, Ware, is the owner by purchase of all the interest of John M. and James D. Gage in the real estate in controversy. Respondent is the owner by purchase of the interest of five of the remaining heirs, including the said Sarah Cummings and Elizabeth Cummings. In 1854, Asahel Gage made a will, in which he directed the sale of a farm owned by him in Canada, and also directed that "the

balance or residue of my estate, both real and personal, after being sold as before mentioned, and the money arising therefrom, together with the cash on hand, notes, bonds, etc., that shall be collected by my executors, shall be divided as near as can be, share and share alike, to my children, that is, John, James, Asahel, Rufus, Mary Ann, Sarah, Elizabeth, Lorintha, Martha and Keziah," etc. After the making of this will, and before the death of the said Gage, to wit, 1859, another child, May, was born to him.

McKenzie & Hemingway, for complainants.

John Porter and *William Phillips*, for respondents.

McCrary, *Circuit Judge.*—My conclusions in this case are as follows:

1. The validity of the will under which the respondents claim title must be determined according to the laws of Iowa, where the land is situated. 1 Redfield on Wills, p. 398; *Lynch* v. *Miller*, 54 Iowa, 516.

2. By the law of Iowa as interpreted by the supreme court of the state, the will was revoked by the birth of an heir after it was executed. *McCullum* v. *McKenzie*, 26 Iowa, 510; *Negus* v. *Negus*, 46 Iowa, 487; *Fallon* v. *Chichester*, 46 Iowa, 588; *Carey* v. *Baughn*, 36 Iowa, 540.

3. The probate of the will in Iowa, while it settles the question of its due execution, does not conclusively establish its validity, or determine its force and effect, when title to real estate is claimed under it. *Fallon* v. *Chichester*, *supra*, and authorities cited.

4. I am furthermore of the opinion (1) that the will does not cover the land in controversy, and (2) that by a fair construction of section 2493, revision of 1860, an alien non-resident could take nothing by will unless such alien, subsequently to the making of the bequest, became a resident. *Krogan* v. *Kinney*, 15 Iowa, 242.

5. It follows that as to the land in controversy there is no

valid will, and the same is to be disposed of according to the Iowa law of descent.

6. It is the settled law of Iowa, that non-resident aliens could not inherit under the statute in force at the time of the death of Asahel Gage. *Krogan* v. *Kinney*, *supra*; *Rheims* v. *Robbins*, 20 Iowa, 45; *Brown* v. *Pierson*, 41 Iowa, 481; *King* v. *Ware*, 53 Iowa, 97.

7. I find that Sarah Cummings and Elizabeth L. Cummings, daughters of said Asahel Cummings, were capable of inheriting by reason of the citizenship of their husbands, which determines their own. R. S. U. S. sec. 1994; *Kelley* v. *Owen*, 7 Wall. 496; Bishop on the Law of Married Women, sec. 505. It appears that the husbands were both born of parents who were citizens of the United States. They were therefore citizens of the United States by birth. R. S. U. S. sec. 2172. It does not appear that they ever renounced their citizenship within the rule laid down in *Talbot* v. *Jansen*, 3 Dall. 133. Neither the father nor the sons ever ceased to be citizens of the United States within the doctrine of expatriation as laid down in that case.

8. It follows from the foregoing conclusions, that the title to the land in controversy at the death of Asahel Gage vested in John M. Gage, James D. Gage, Sarah Cummings and Elizabeth L. Cummings, each being entitled to the undivided one-fourth thereof.

9. As complainant Ware is the owner by purchase and conveyance of the interests of John M. and James D. Gage, he is entitled to a decree confirming and quieting his title to the undivided one-half of said land; and as the respondent Wisner is the owner by purchase and conveyance of the interest of the said Sarah Cummings and Elizabeth L. Cummings, he is entitled to a decree confirming and quieting his title to the remaining undivided one-half thereof.

10. The decree will be to quiet the title to one undivided half of the land in complainant Ware, and to the other undivided half thereof in respondent Wisner, and the costs will be equally divided between them.

Boyd *v.* Cherry.

(District of Iowa, Eastern Division. January, 1883.)

1. Patent — Process.— By process is meant the application or operation of some element or power of nature, or of one subject to another; as for example, the art of tanning, dyeing, smelting ores, and the like. In such cases, the invention consists in the application of old and well-known principles to new and useful purposes.
2. Same — Infringement.— Where a manufactured article may be used for several purposes, one of which is protected by patent, and a manufacturer makes and sells it to customers, with instructions how to use it in violation of the patent, the inference arising from their sale with such instructions is very strong that the intent is to violate the patent, and standing alone is sufficient proof thereof.
3. Prior Use — Valuable Results — Utility.— In order to establish the defense of prior use, it must appear that the prior discoverer or inventor had such a conception of the invention as would have enabled him to give it to the public. A prior inventor is one who first discovers the principle, and, by putting it into practice and intelligent use, first makes it available to man. Results accidentally and unwittingly produced, while the operators were in pursuit of other and different results, without exciting attention, will not amount to prior discovery and use.

In equity.

The complainant by his bill charges respondent with the infringement of a patent granted to William Cooley and duly assigned to him. The said patent bears date February 20, 1877, and is for "an improvement in obtaining cream from milk." It is described in the opinion.

The defense is twofold:

1. That Cooley was not the original and first discoverer of the process described in his patent; or in other words, prior use by other persons.

2. That even if complainant's patent is valid, defendant has not infringed.

Proofs have been taken and the case has been twice argued. Upon the first hearing, the court found that the defense of prior use was sustained, but granted a rehearing.

Munday, Evarts & Adcock, Wishard & Read and *Phillipps, Goode & Phillips*, for complainant.

Stoneman, Rickel & Eastman, for defendant.

McCrary, *Circuit Judge.*— As it is admitted that the respondent has manufactured and sold a milk can constructed according to the patent issued to him on the twenty-third of September, 1879, known as the "Hawkeye patent," our first inquiry will be as to whether this is an infringement of the earlier patent under which the complainant claims. An examination of the two patents will clearly show that they are substantially for the same invention.

For convenience I will designate the older patent as the "Cooley patent," and the later one as the "Cherry patent."

The Cooley patent is described as "a new process of raising cream from milk," and the specification declares that "it consists mainly in water-sealing the milk within the vessel containing it, and also in submerging such vessel in water and in apparatus hereinafter described."

The Cherry patent is described as "an improved means of raising cream from milk, and for driving off the animal heat or vapor contained in the same in the shortest and best possible manner;" and the specification further declares that "the invention consists essentially in water-sealing the milk within the vessel containing it, by means of a cover of novel construction, and submerging such vessel and cover in a tank of water."

In both patents, one main purpose is declared to be the excluding of the milk from the outer atmosphere during the process of raising the cream. Thus the specification in the Cooley patent declares:

"By my present invention I water-seal the can or other vessel containing the milk to be treated, whereby all possibility of the entrance into it of foreign matter, gases or odors is prevented," etc.

And the specification in the Cherry patent declares that

"the vessel containing the milk is submerged in a tank of water, and the milk not only excluded from the outer atmosphere, but an equality in the temperature is established and maintained throughout the entire vessel, and the animal heat or vapor driven out into the surrounding water."

In both patents the utility of the invention is declared to consist in substantially the same thing. Thus the specification in the Cooley patent says:

"The ordinary mode of raising cream is with open cans, either shallow or deep, and then by hand labor skimming the cream from the surface after the milk has stood from say thirty-six to forty-eight hours. This mode is open to several serious objections, among which may be named the exposure of the milk to the atmosphere, from which it attracts insects and absorbs gases and odors, often very deleterious, and from which it collects and retains dust and dirt floating in the air; the agitation of its surface from winds and other causes; the great length of time required to raise the cream; the unavoidable lack of uniformity in the quality of the cream, and consequently in the butter made from it, because of the various subtile and invisible atmospheric causes which tend to taint, acidify or otherwise vitiate it; the position and direct exposure to all the sudden changes, electrical, thermal and otherwise, of the atmosphere; and the necessity of having pans enough to hold the milk of two or more days' milking."

On the same subject the specification in the Cherry patent states:

"It will be observed that by the old method of raising cream in open, shallow pans, the milk absorbs deleterious odors and gases and collects dust and dirt floating in the air, and is also subject to various changes of atmosphere, and rendering a lack of uniformity in the quality and quantity of the cream produced, and consequently lessening the value of the butter made from it. By means of the present improvement these objections are entirely obviated, inasmuch as the vessel containing the milk is submerged in a tank of

water, and the milk not only excluded from the outer atmosphere, but an equality in the temperature is established and maintained throughout the entire vessel, and the animal heat or vapor driven out into the surrounding water."

The similarity in the two patents becomes still more apparent when we come to compare the description of the invention and the milk cans actually constructed under them, some of which are in evidence before us. In both there is a cylindrical receptacle or pan for holding the milk. In both there is a tank or vessel for holding water into which the milk can is placed. In both there is a movable cover for the can, shaped somewhat like an ordinary tin pan, and placed upside down on the top of the can, the overlapping or flaring sides of the cover leaving an annular space between such sides and the can. Both are rendered air-tight by water-sealing; that is, by being submerged in water, or so nearly submerged that the air is excluded from the can.

In both, the process contemplates that the can shall stand in the water until the cream is gathered at the top; and in both an outlet is provided at the bottom by which to draw off the milk, leaving the cream only in the can. True, there are some differences, but they are immaterial, and my conclusion is that the two patents are substantially identical.

But the counsel for the respondent insists that he has not infringed the Cooley patent; and their argument is that said patent is for a process and not for a mechanical device, while respondent's invention is for the latter and not for the former. It is impossible to maintain this distinction between the two patents. What one is, in this respect, the other is.

They are alike. In my judgment both patents cover a process to be accomplished by a combination of mechanical devices.

A process is patentable provided that it is new and useful.

By process is meant the application or operation of some element or power of nature or of one subject to another. As examples of patentable processes, the art of tanning, dye-

ing, smelting ores, and the like, may be mentioned. In these and in other similar cases the merit of the invention consists not in the discovery of any new law of nature or principle of science or natural philosophy, but in the application of old and well known principles to new and useful purposes. There can be no patent upon an abstract philosophical principle. The laws of nature and properties of matter are presumed to be known to and subject to be utilized by all alike. But the application of any one or more of these laws or principles to a practical object, and so as to secure a useful result not previously attained, is patentable. *Neilson* v. *Horford*, 1 Webster's Pat. Cases, 273; *Corning* v. *Burden*, 15 How. 267; *Cochran* v. *Deener*, 94 U. S. 780; *Rubber Company* v. *Goodyear*, 9 Wall. 788.

I doubt very much whether the mechanical appliances described in each of the patents is patentable aside from the process. Considered merely as cans or milk vessels, there would seem to be little, if any, novelty in them. But however this may be, it appears from an inspection of the Cherry patent itself that it is intended to cover the process, and that the cans are to be used only for the purpose of raising cream in the manner described. Besides, the evidence discloses the fact beyond question that the respondent manufactures the "Hawkeye pan" and sells it to customers to be used by them in raising cream from milk according to the process described in the Cooley patent. He advertises and sells the can for this very purpose. They are especially adapted to it, and to no other, and the inference arising from their sale, that they are to be used, would be very strong.

When it is added that they are generally, if not always, accompanied by directions to purchasers as to the mode of using them, which directions require the adoption and use of the Cooley process, it becomes very clear that the fact of infringement is established. *Bowker* v. *Dows*, 3 Banning & Arden's Pat. Cases, 518; *Rumford Chemical Works* v. *Hecker*, 2 id. 351; *Wallace* v. *Holmes*, 5 Blatch. 65.

It only remains to consider the defense of prior use. The proof undoubtedly shows that before the date of Cooley's invention, several other persons had been in the habit of occasionally submerging vessels containing milk during the process of raising cream therefrom, and in some instances, at least, such use was public.

But it also clearly appears that none of these persons proceeded so far as to discover the utility of the process, or were aware of the fact that by it the important and valuable results since achieved by Cooley could be secured.

It is beyond doubt that Cooley was the first to discover and to make known to the public the fact that by this process the cream could be raised in a much shorter period of time than by any other known means, and that by it a better quality of butter was to be secured at a reduced cost. The others doubtless came very near to this discovery, but they overlooked it, as is apparent from the fact that no other one of them thought enough of the process to permanently adopt it, or to apply for a patent upon it, until after the Cooley patent had come into use and its great utility had been demonstrated. It follows that the controlling question upon this branch of the case is, whether it is necessary for the defendant, in order to sustain the defense of prior use, to show, not only that the process was publicly used before Cooley's discovery, but that it was so used by some person or persons who perceived the fact of its utility, who knew what could be accomplished by it, and who communicated this information to the public?

But upon authority and upon principle I am constrained to answer this question in the affirmative.

In *Tilghman* v. *Proctor*, 102 U. S. 711, the supreme court, through Mr. Justice Bradley, held an alleged prior use not sufficiently proved, for the reason, among others, that the result had been "accidentally and unwittingly produced, while the operators were in pursuit of other and different results, without exciting attention, and without its even being known

what was done, or how it had been done. In *Pelton* v. *Waters*, 7 Off. Gaz. 426, the rule is distinctly recognized that the prior discoverer or inventor must have had such a conception of the invention as would enable him to give it to the public. Said Emmons, speaking of the alleged prior inventor in that case, "he not only did not give and could not give it (the invention) to the public, but he did not possess it himself."

The same rule is recognized in *Andrews* v. *Harmon*, 9 Off. Gaz. 1011, where it is declared in effect that the person "who first discovers the principle, and by putting it into practical and intelligent use *first makes it available to man*," is the first inventor.

If the alleged prior use of the process was under such circumstances that the public obtained no knowledge of the mode of its operation, or of the results to be attained by it, there is no prior use within the meaning of the patent law.

"In other words, if the parties who made the combination, although seeing with the eye perceived not, and hearing with the ear understood not, . . . they added nothing to their own stock of knowledge, and the fact, if observed by other men (if they understood it not), added nothing to the science on that subject. Therefore the invention was not made until the parties contriving, or others observing the existing combination, *saw that it could be made available for the purpose of producing a result similar to the one which the plaintiffs have mentioned in their specification.*" *Ransom* v. *Mayor*, 1 Fisher, 267.

These adjudications are based upon a sound principle. The rights of a patentee are granted to him upon the consideration of the giving by him to the public of a new and useful discovery. If some one before him had already given the same invention or discovery to the public, this consideration falls, and he has no basis for his claim of exclusive right. Hence it is that the alleged prior invention must have been made public.

If kept secret by the first inventor until the second has discovered it and given it to the public, the latter will be protected, for it is to him that the public is indebted; it is from him that the public has received value; and as no one can impart that which he does not possess, it must appear that the alleged prior inventor was aware not only of his discovery, but also of its utility.

These considerations lead to the conclusion that complainant is entitled to a decree in accordance with the prayer of the bill for an injunction and accounting.

Let a decree be entered accordingly.

Adams Express Co. *v.* Denver & Rio Grande R'y Co.

(District of Colorado. June, 1883.)

1. Acts of Territorial Legislature Not Federal Statutes — Corporation Created by a Territorial Legislature, No Right to Sue in Federal Court. — The legislative power to be exercised by a territorial legislature is the legislative power of the territory, and not of the United States. Territorial statutes have a distinct and well-defined character of their own. A corporation created by the territorial legislature of Colorado is not a federal corporation, and cannot, therefore, sue in the United States courts as such — even if it were conceded that corporations organized under the laws of the United States possess the right to sue in those courts.
2. Federal Corporation — Right to Sue in Federal Courts — Jurisdiction. — The fact that a suit is by, or against, a federal corporation, is not, of itself, sufficient to confer jurisdiction upon a federal court. A case arises under a law of the United States when some question is presented involving the construction of some provision thereof, or when some right or privilege is claimed thereunder.
3. Grant of Right of Way Through Public Domain — Effect of — Jurisdiction. — An act of congress granting to a railway company, organized under territorial legislation, right of way through the public domain does not create the corporation, but only grants to an existing corporation certain rights, and constitutes no ground of jurisdiction on the part of the federal courts in a case in which the cause of action does not in any sense rest upon or grow out of the grant of such right of way.

4. PRACTICE — SUPPLEMENTAL BILL BRINGING IN PARTIES NOT AUTHORIZED TO SUE, NOT MAINTAINABLE — OUSTER OF JURISDICTION. — Bill having been filed by the Adams Express Company, which, being a foreign corporation, having the right to sue in this court, a supplemental bill joining, as co-plaintiff, Wells, Fargo & Co., a corporation created by act of the territorial legislature of Colorado, will not be allowed. It cannot be maintained that the complainant in a suit may voluntarily transfer all or a part of his interest in the subject matter of the litigation to a citizen of the same state with the defendant without ousting the jurisdiction.

This is a bill in equity instituted for the purpose of establishing the right of the complainant, the Adams Express Company, to carry on the express business upon the line of the railway of the respondent, and to enjoin the respondent from interfering with the exercise of that right. A preliminary injunction was granted. Subsequently the complainant applied to the court for leave to file a supplemental bill and to bring in as co-complainant Wells, Fargo & Co., a corporation organized under the laws of the territory of Colorado. This upon the ground that since the filing of the original bill and the joining of issue thereon, Wells, Fargo & Co. has become, and now is, a copartner with Adams Express Company in the express business on the defendant's railway. The written contract between these two corporations is in evidence, and the parties are not agreed as to its force and effect. The complainant, on the one hand, insists that it provides simply for the establishment of a community of interest between the two express companies in the express business upon the respondent's line; while the respondent insists that it amounts to a complete transfer by the original complainant to Wells, Fargo & Co. of the whole of said business, coupled with a stipulation that this litigation may be carried on, if necessary, in the name of the original complainant, and the business may be transacted in its name. The respondent opposed this application for leave to join Wells, Fargo & Co. as co-plaintiff, upon various grounds, which are stated in the opinion. The respondent having

filed a supplemental answer alleging that complainant has, since the institution of this suit, parted with all its interest in the subject matter thereof, and having taken proof tending to support this allegation, thereupon moves to dismiss the bill. It appears that the respondent and Wells, Fargo & Co. are both corporations organized under the laws of the territory of Colorado. The other facts, so far as they are deemed material, are stated in the opinion.

McCrary, *Circuit Judge.*—We are to consider, first, the motion of complainant for leave to file a supplemental bill, and bring in Wells, Fargo & Co. as co-complainant; and second, the motion of respondent to dismiss the bill on the ground that complainant has parted with all its interest in the subject matter of the suit.

In considering the first motion, counsel have discussed at length the question of the force and effect of the contract whereby it is claimed the complainant and Wells, Fargo & Co. have become jointly interested in carrying on the express business upon the line of respondent's railway until the termination of this suit. If it be claimed that, by virtue of this agreement, Wells, Fargo & Co. acquired any right to carry on the express business upon the railroad that it did not possess before, I cannot assent to the claim. The complainant never had any exclusive property in the right to carry on the express business over respondent's railroad. The right belongs alike to all express companies. One of such companies cannot monopolize it, nor take from nor convey to another the privilege of exercising it. It is, however, no doubt true that these two express companies could consolidate and become one company, and, as such, have the right to carry on the express business; and if such a consolidation were alleged in this case, doubtless the consolidated company could, if possessing the proper citizenship, be substituted as complainant. But it is insisted that the two companies have not consolidated, but have agreed that the express business now con-

trolled by both parties shall, so far as the conduct of the same in the state of Colorado and the territories of Utah and New Mexico are concerned, be conducted for their joint, common benefit. This view of the contract is strengthened by the fact that it is provided in the contract, which is set forth in the supplemental bill, that the express business upon the line of the respondent's railway shall be carried on in the name of the Adams Express Company for the joint benefit of both the express companies, but under the exclusive control of Wells, Fargo & Co. The partnership thus constituted by the terms of the agreement is to continue only pending this suit; and in case a decree is obtained establishing the right of both companies, or Wells, Fargo & Co. alone, to carry on the express business on such railway line, then the partnership is to be dissolved, and Wells, Fargo & Co. is to have the sole right to conduct the same. It is further provided that, if this agreement is held to affect the right of the complainant to prosecute this suit, the same shall become canceled, abrogated and annulled.

If it were necessary now to decide the question, I should certainly be strongly inclined to say that this is not a *bona fide* agreement to consolidate the two express companies, or to form a partnership between them for the purpose of jointly conducting the express business on the respondent's railway. It would seem to me to be an agreement, the ultimate purpose of which is to transfer from complainant to Wells, Fargo & Co. the right to carry on the business and to give to the latter the benefit of any decree which may be rendered herein. If such be the true construction of the contract, it would seem to be obnoxious to the objection that it is an attempt to trade or traffic in that which, in its nature, is a right or privilege common to all persons engaged in the express business, and which cannot be private property in the hands of any one. It would also seem to be obnoxious to the objection that it is an attempt to sell and assign a mere right to litigate. It is not, however, necessary

at present to determine finally the question of the force and effect of the written contract between these two express companies. For if we assume that the contract is valid, and that it confers upon Wells, Fargo & Co. a substantial right, we have then to determine whether it is a right which, as against the respondent, can be enforced in this court, both Wells, Fargo & Co. and respondent being corporations organized under the laws of the territory of Colorado. In order to meet this difficulty, the counsel for the complainant insist, in the first place, that Wells, Fargo & Co. is a federal corporation, and, as such, entitled to sue and be sued in the federal courts, irrespective of the subject matter. Is Wells, Fargo & Co. a federal corporation? It is a corporation organized under a special act of the legislature of the territory of Colorado, and the argument is, that, inasmuch as the territory was organized under and by virtue of an act of congress, the acts of the territorial legislature must be regarded as acts passed by the authority of the United States, and are to be treated as federal statutes. This argument is not sound. The act of congress to provide a temporary government of Colorado did not authorize the territorial legislature to exercise any of the powers of congress; but rather the legislative power of the territory. The authority of the people of the territory, through their legislature, to make laws for themselves within certain limits, was recognized. The language of the fourth section of the act is, "That the legislative power and authority of the said territory shall be vested in the governor and the legislative assembly."

The legislative power to be exercised by the territorial legislature is the legislative power of the territory, not that of the United States. Both states and territories, in a certain sense, derive their existence from the legislation of congress, but the jurisdiction and authority exercised, either by a state or territory, is that of a state or territory, and not that of congress. Territorial statutes have a distinct and well-defined character of their own. The people of a territory,

when authorized to form a territorial government, are vested with a qualified sovereignty. Congress may limit their powers, and may annul their enactments, but, subject to these limitations, the territory is a government. Its laws, unless set aside by congress or the courts, are the laws of the territory; they are not laws of the United States, within the ordinary meaning of those terms, certainly not in the sense that the acts of congress, approved by the president, are laws of the United States. It follows that Wells, Fargo & Co. is not a federal corporation, and could not, therefore, sue in this court, independently of its citizenship, and of the subject matter, even if it were conceded that every corporation organized under the laws of the United States possesses the right to sue in the federal courts. This, however, is not conceded; on the contrary, I am of the opinion that a case cannot be said to arise under the laws of the United States, within the meaning of the act of 1875, conferring jurisdiction upon the circuit courts of the United States, simply because it is a suit by or against a corporation organized under a federal statute; congress might, according to the decision of the supreme court of the United States in *Osborn* v. *The Bank*, 9 Wheat. 739, enact that all such corporations shall have the right to sue and be sued in the federal courts, but it has not seen fit to do so. The provision of the statute is not that *any* corporation organized under a law of the United States may sue or be sued in the federal courts, but that those courts shall have cognizance of suits "arising under the constitution and laws of the United States." It has been several times held in this circuit by the writer of this opinion, with the concurrence of Mr. Justice Miller, that this language includes only cases in which some question is presented involving the construction of some provision of the constitution, or of an act of congress, or in which some right or privilege is claimed under or by virtue thereof. See *Myers* v. *Union Pacific Railway Company*, 3 McCrary, 578.

It is, however, insisted by complainant's counsel that, even conceding this to be the true rule, this court should take jurisdiction of the supplemental bill, because, it is said, certain rights are claimed under the laws of the United States. Much of the argument upon this point is based upon the assumption that the charter of Wells, Fargo & Co., enacted by the legislature of the territory of Colorado, is a federal statute, which, as we have seen, is not so. It is, however, further insisted that the respondent, the Denver & Rio Grande Railway Company, derives certain rights and exercises certain powers by virtue of an act of congress, and that, therefore, it may be sued in this court. The respondent, like Wells, Fargo & Co., was chartered by the territory of Colorado, but an act of congress was passed granting to it the right of way over the public domain. This act of congress does not purport to create a corporation, but only to grant to an existing corporation certain rights. The respondent, the railway company, is not a common carrier by virtue of the act of congress, but by virtue of its charter granted by the legislature of Colorado. Nor does the complainant base its right to relief upon anything contained in the right of way act above named. The record shows that the right claimed to the relief sought is based upon the fact that the respondent "is a public corporation and a common carrier, under the charter aforesaid," and the whole course of the litigation in this and other similar cases shows that no right to carry on the express business upon the respondent's line of railway can be based upon or grow out of any provision of the aforesaid act of congress. The respondent is a common carrier by virtue of its charter, and its charter is an act of the territorial legislature of Colorado. It is not enough that counsel states in argument that the complainant claims under an act of congress. It must appear from the record that such claim is made, and the court must be satisfied that upon the record it can legitimately arise.

I am clearly of the opinion that Wells, Fargo & Co. and

respondent are both corporations created by the laws of the territory of Colorado, and not federal corporations, and also that the rights asserted by complainant in the original and supplemental bill are not based upon and do not grow out of any law of the United States.

But it is insisted that the supplemental bill will be but the continuation of the original suit, and that therefore the court may take jurisdiction of the same. The authorities cited to sustain this proposition are those which lay down the rule that when the jurisdiction has once attached it will not be ousted by a change in the domicile of one of the parties or by the death of one of the parties, and the substitution of his legal representatives, even if the latter be citizens of the same state with the opposite parties. *Morgan's Heirs* v. *Morgan et al.* 2 Wheat. 290; *Clark* v. *Matthewson*, 12 Pet. 164; *Dunn* v. *Clark*, 8 Pet. 1. This doctrine has no application here. It has never been held, and cannot, I apprehend, be maintained, that the complainant in a suit may voluntarily transfer all or a part of his interest in the subject matter of the litigation to a citizen of the same state with the defendant, without ousting the jurisdiction. If this were allowed, it would make it possible in any case for a non-resident plaintiff, who has instituted a suit in the federal court, to transfer his cause of action to a citizen of the same state with the defendant, and thus bring controversies between citizens of the same state within the federal courts. It was accordingly held, in *Dunn* v. *Clark*, *supra*, that while no change in the residence or condition of the original parties can take away jurisdiction which has once attached, yet, "if other parties are made in the bill and different interests involved, it must be considered to that extent at least an original bill, and the jurisdiction of the circuit court must depend upon the citizenship of the parties." If, therefore, we should assume that the cause of action stated in the original bill was assignable, and that the whole or some part of it has been assigned and transferred to Wells, Fargo & Co.,

still this court cannot take jurisdiction of the supplemental bill, because it presents a controversy between two Colorado corporations, and which was not a part of the original suit in the sense of being between the same parties or their privies.

My conclusion is, that this court cannot take jurisdiction of the supplemental bill for the purpose of enforcing, as against the respondent, any right of Wells, Fargo & Co., either alone or jointly with complainant, and the motion for leave to file the proposed supplemental bill is accordingly overruled.

Upon the second question (the motion to dismiss the bill), it is only necessary to say that the complainant may be entitled to some measure of relief, notwithstanding the contract between Wells, Fargo & Co., and even if said contract should be construed in accordance with the respondent's claim. I suppose that at least some question as to the compensation to be paid the respondent for the privilege of carrying on the express business in the past may remain to be adjusted on the final hearing. Whether any other or further relief can be granted to the complainant, is not now to be considered.

The motion to dismiss is overruled.

Charles W. Blair and *Clarence A. Seward*, for complainant.

Lyman K. Bass and *Wolcott & Milburn*, for respondent.

RIES and another *v.* ROWLAND and another.

(Eastern District of Missouri. April, 1882.)

1. TRUSTS — DEBTOR AND CREDITOR. — Any use by a creditor of a debtor's property, whereby a secret substantial advantage is secured to the latter, amounts to a secret trust.
2. JUDGMENT — MERGER. — Where suit is brought and judgment recovered upon a claim, it is merged in the judgment, and the latter is conclusive as to the amount due.

Ries and another v. Rowland and another.

3. DEBTOR AND CREDITOR — ESTOPPEL. — Where an attaching creditor recovered judgment against an insolvent debtor, and the goods attached were sold by the marshal under an order of court, and bought by the judgment creditor pursuant to an agreement made by him before the sale with the judgment debtor, whereby it was understood that the creditor should purchase the goods at the lowest possible price and place them in the debtor's hands, to be sold by him as the creditor's agent, to the best advantage, and that after the payment of the creditor's claim and expenses the balance should be turned over to the debtor, and the goods were subsequently sold by the debtor as the purchaser's agent, and the proceeds remitted to the purchaser: *Held*, (1) That the agreement on the debtor's part constituted a sufficient consideration for the agreement on the part of his creditor. (2) That said creditor was liable to other creditors of said debtor for any sum remaining in his hands as proceeds of the sale of said goods by the debtor, over and above the sum of his own debt, together with his proper expenditures in connection with the management and sale of the said goods, and the sum paid to the marshal in satisfaction of his bid. (3) That said creditor was estopped to claim any sum to be due him, on account of the transaction embraced within the suit in which he had recovered said judgment, over and above the amount of the judgment.

Bill in equity, filed by and on behalf of judgment creditors of defendant W. J. Johnson, for the purpose of subjecting to the payment of their judgments an alleged balance in the hands of defendant Rowland, the proceeds of the sale of a stock of goods and merchandise formerly belonging to said Johnson. The material facts are as follows:

In the year 1880, Johnson, who had prior to that time been engaged in business as a merchant at Hot Springs, Arkansas, became insolvent. Certain of his creditors, and among them defendant Rowland, who did business in the name of D. P. Rowland & Co., instituted suits by attachment against him, by virtue of which a large stock of merchandise at Hot Springs was attached. There were several attachments levied prior to that of Rowland. While the goods were in the hands of the marshal an agreement was entered into between Rowland and Johnson, whereby it was understood that Rowland should purchase the goods at the

marshal's sale for the lowest possible price, and should then place them in the hands of Johnson, as his agent, to be sold and disposed of to the best possible advantage; and that after the payment to Rowland of his debt and expenses, the balance should be turned over to Johnson. Accordingly an order of court was obtained for the sale of the goods, and at the sale, Rowland, acting through one W. B. Moore, as his agent for that purpose, bid in the entire stock, which was sold in bulk for the sum of $4,250.

Johnson was placed in possession of the goods, and proceeded to make sales thereof, from time to time reporting to Rowland and remitting the proceeds of such sales, until the entire stock was sold and all the proceeds remitted. The contention of the complainants is that the sum realized by Rowland exceeded the amount due from Johnson to him and his expenses, and that the balance is held by Rowland in trust for Johnson or his creditors; and that, Johnson being insolvent, the complainants are entitled to subject the balance in his hands to the payment of their debts by the proceeding in equity.

Robert Crawford and *M. H. Cohn*, for complainants.

Hayden & Glover, for respondent Rowland.

McCrary, *Circuit Judge.*—The weight of the evidence clearly establishes that defendant D. P. Rowland, as D. P. Rowland & Co., entered into an agreement with defendant Johnson, whereby he (Rowland) was to bid in the stock of goods at the marshal's sale at the lowest price possible, and was to place Johnson in charge of the stock to make sales, and that after receiving from the proceeds of such sales the amount of his debt and expenses, any balance left should go to Johnson or his creditors. There is some testimony tending to show that improper and unlawful means were employed for the purpose of preventing competition among the bidders at the marshal's sale, and obtaining the goods for less

than their value; but the view the court takes of the case renders it unnecessary to decide the question whether this is established by sufficient evidence. The complainants do not seek to set aside the marshal's sale, but only to hold the defendant Rowland as a trustee for Johnson's creditors for the amount of any balance in his hands as the proceeds of the sales of the goods after paying the amount of his debt and expenses, including the sum paid on his bid to prior execution creditors. To support this claim it is not necessary to establish the charge of fraud or conspiracy, and hence not necessary to show that improper means were employed to prevent competition.

We may, for the purpose of this case, assume that there was no impropriety in the agreement to buy in the stock for as low a price as possible, and to give Johnson the benefit of any balance that might be left after paying Rowland's just claims, for it is clear that such an agreement, if made and carried out, constituted Rowland a trustee as to any such balance when it came into his hands. Such a transaction constitutes a secret trust. "If any secret, substantial advantage is secured to the debtor from the use of the property, or from its proceeds, this constitutes a secret trust." Bump, Fraud. Conv. (2d ed.) 213; *Rice* v. *Cunningham*, 116 Mass. 466; *Coburn* v. *Pickering*, 3 N. Y. 415.

An agreement between the purchaser at the sale and the judgment debtor that the former will allow the latter to sell the property as his agent, and to have all he can make beyond a sum agreed upon between them, undoubtedly secures an advantage to the debtor, to which a creditor may (the debtor being insolvent) in equity be subrogated. If it were a private sale, it would be void as in fraud of the rights of creditors (*Grant* v. *Lewis*, 14 Wis. 487); and where the sale is public or judicial, it is at least so far voidable that the creditors of the insolvent debtor may subject his beneficial interest in the property, or the proceeds thereof, before they pass into the hands of an innocent party, to the satisfaction

of their just demands. A public judicial sale may be wholly set aside as fraudulent on the ground that there has been a combination between the purchaser and the debtor to have the property sold for less than its value in order that the debtor may derive some advantage therefrom; and "when the property, or any part of it moreover, is held in secret trust for the debtor, the sale is calculated to baffle creditors, for the title is ostensibly put out of the debtor and vested in the purchaser, apparently for the sole use of the latter, so as to exempt it from execution, but really for the use of the debtor." Bump, Fraud. Conv. (2d ed.) 2589; *Stovall v. Farmers' Bank*, 16 Miss. 305; *Hawkins* v. *Allston*, 4 Ired. Eq. 137. And it seems clear that if, under such circumstances, the sale may be wholly set aside as void, the other creditors may elect to let the sale stand, and hold the purchaser to be a trustee for them in equity for any sum secured by him from proceeds of the sale of the property, over and above the amount of his just demands. Especially is this so in a case like the present, where the agreement to give the debtor an interest in the proceeds is shown, not by circumstances alone, but by direct and positive proof.

It is, however, insisted in argument that the arrangement by which the judgment debtor in this case was to share in the proceeds of the sale of the property was purely voluntary on the part of Rowland, and therefore one by which he is not bound. This contention cannot be supported. The agreement that Johnson should take possession as the agent of Rowland, and should sell the goods to the best possible advantage of both parties, especially in the absence of any agreement as to his compensation, was a sufficient consideration for Rowland's promise to give Johnson the interest in question, to say nothing about the latter's promise to aid in the effort to secure the sale of the goods at the lowest possible price.

It is also contended that the plaintiffs have no right of action because the sale and conveyance were by the marshal,

and there was no deed direct from the debtor to Rowland. But it is the duty of a court of equity to look beyond the form of the transaction and into the substance. It does not help the matter to show that the sale was in form a judicial sale and not a sale by the debtor, if it appears with sufficient clearness that notwithstanding this mode of conveyance a substantial interest in the property was, by collusion or connivance, or by agreement, retained in the judgment debtor. Bump, Fraud. Conv. (2d ed.) 2578, and cases cited.

The conclusion drawn from these considerations must be that the complainants are entitled to any sum remaining in the hands of defendant Rowland, as proceeds of the sale of the stock of goods in question, over and above the sum of his own debt against Johnson, together with his proper expenditures in connection with the management and sale of the stock and the sum paid to the marshal in satisfaction of his bid.

It only remains to determine the principles upon which the account is to be stated, for the purpose of determining whether any, and if any, what, balance remains in the hands of defendant Rowland for which he may be charged as trustee. And here arises the most important question in the case: Is defendant Rowland estopped to claim, as against Johnson or the complainants, any sum over and above the amount of his judgment against Johnson on account of the transactions embraced within the attachment suit in which said judgment was rendered? In rendering his account to Johnson the defendant Rowland disregards the judgment, or at least does not recognize it as a settlement of all demands down to its date. Two accounts are rendered — one to Johnson individually, running down to the date of the sale by the marshal, and the other with Johnson as agent, running from the date of the sale down to the sale of the last of the goods and the remittal of the proceeds. It appears from the evidence that Rowland's claim against Johnson was for and on account of money advanced from time to

time upon cotton shipped by Johnson to Rowland, and received by the latter as a commission merchant at St. Louis. At the time of Johnson's failure Rowland made out his account against him for the purpose of bringing suit against him by attachment. In that account he charged him with all the advances up to the date of the commencement of the suit, and gave him credit for all sales of cotton made prior to that date, and then, to close the account, gave him credit for two hundred and eleven bales of cotton on hand, at market value — $9,073,— leaving as net balance due Rowland from Johnson $3,060.90, for which suit was brought. The complaint in the attachment suit, which was sworn to, exhibits this account as a true and itemized statement of the debt due from Johnson to Rowland.

By this proceeding the defendant Rowland elected to charge himself and to credit to Johnson the cotton on hand at the time of the commencement of his suit, at the price and value stated in his account, and he is clearly estopped now to insist or claim that the cotton was of less value than that then stated. No principle is better settled than that a judgment or decree establishes in the most conclusive manner the sum due upon the claim sued upon. The cause of action is merged into the judgment, and can never again become the basis of any claim against the defendant in the judgment. The original claim has, by being sued upon and merged into the judgment, lost its vitality and expended its force and effect. "All its power to sustain rights and enforce liabilities has terminated in the judgment or decree." Freem. Judgm. ch. 2, p. 180 *et seq.*, and authorities there cited.

The court is clearly of the opinion that, as between complainants and defendant Rowland, an account must be stated, based upon the conclusiveness of the judgment in the attachment suit, and upon the theory that Rowland is estopped to claim any sum on account of the transactions embraced within the account sued upon in that case, over and above

the amount of the judgment, interest and costs. The balance of cotton remaining in the hands of Rowland when he commenced his attachment suit became his property and must be so treated.

Another question arises, as follows: The record shows that the stock of goods was sold to Rowland for $4,250, being bid off for him by his agent, W. B. Moore, and that out of said sum the proper costs of the marshal were paid. It appears in evidence that Moore reported to Rowland that he had bought the stock for $4,250 and $525, and he therefore drew upon Rowland two separate drafts, one for $4,261.65 and the other for $507.50. These drafts were paid by Rowland and charged to Johnson. It is now insisted that the smaller draft was improperly paid, or, at all events, improperly charged to Johnson. It is apparent that Moore drew the smaller draft for a sum in addition to the amount bid for the stock of goods. For what object the money was drawn does not appear, and it is somewhat remarkable that neither party saw fit to interrogate Moore while upon the witness stand with reference to this item. As Rowland, through his agent, Moore, expended the sum of $507.50, and assumed the right to charge it to Johnson, and as it clearly appears that it was not paid in satisfaction of the bid, it was the duty of Rowland to show by proof that it was a proper charge against Johnson, and since he has failed to do so it cannot be allowed. The other disputed items in the accounts of Rowland against Johnson seem to have been legitimate expenditures in connection with the management, care, preservation and sale of the stock of goods, and they will therefore be allowed.

The case will be referred to a master to state the account from the evidence, and to report what, if any, balance remains in the hands of the defendant Rowland with which, in accordance with the principles of this opinion, he should be charged as trustee for the complainants as creditors of defendant Johnson.

THOMPSON & CO. *v.* SHEA.

(District of Iowa. June, 1881.)

1. DAMAGES — PROVINCE OF JURY. — It is the province of the jury to find the amount due, as well as plaintiff's right to recover, and after the jury are discharged the court cannot increase the sum found.
2. NEW TRIAL — DISCRETION OF COURT. — Motions for new trial are addressed to the sound discretion of the court.

On motion to set aside verdict.

LOVE, *District Judge.* — I have consulted with Mr. Justice Miller about the motion in this case, and we find no warrant in law for increasing the sum found by the jury, and entering judgment for said increased sum. It was a part of the province of the jury to find the amount due, as well as the plaintiff's right to recover. If the jury had brought a verdict for the plaintiff without finding any sum, the court would have directed them to amend their verdict in that regard; and it would have been competent for the plaintiff to have moved the court to require the jury to correct their verdict before they were discharged; but the jury having been discharged, the court cannot increase the sum found. All that the court could do would be to set aside the verdict and order a new trial. Motions for new trials are, in the United States courts, addressed to the sound discretion of the court. The party losing has no absolute right to a new trial. This cause having been three times tried, and the sum now in dispute being less than $1,000, the court must refuse to exercise its discretion in favor of granting a new trial.

The plaintiff's motion is denied and overruled, and there will be a judgment in accordance with the verdict.

Parsons & Runnells, for plaintiffs.

Phillips, Goode & Phillips, for defendant.

MYERS, Assignee, *v.* HAZZARD *et al.*

(District of Nebraska. September, 1881.)

1. NEGOTIABLE PAPER SECURED BY MORTGAGE — RIGHTS OF BONA FIDE PURCHASER.— The *bona fide* purchaser of negotiable paper, secured by mortgage, before maturity and without notice, takes the mortgage, as he does the notes, freed from equities arising between the previous parties thereto, and also freed from any latent equity existing in an assignee in bankruptcy, at the time of the assignment of the notes, of which latent equity there is no notice actual or constructive.
2. SAME — SAME — EXTENT OF PROTECTION EXTENDED TO BONA FIDE PURCHASER.— The *bona fide* purchaser of negotiable notes secured by mortgage, where the mortgagor had the legal title and possession of the mortgaged property, but held it fraudulently, is entitled to the same protection that would be accorded to the purchaser of property from a fraudulent vendee in good faith and without notice of the fraud. Such a purchaser would be unaffected by latent equities of third parties of which he had no notice.
3. LIS PENDENS — NEGOTIABLE INSTRUMENTS.— Negotiable instruments are not subject to the rule of *lis pendens*. The pendency of a suit in Nebraska to restrain the payee of certain notes from negotiating them, the injunction not being served upon the holder of said notes, *held* no notice to a purchaser of said notes in Chicago, Illinois.
4. BANKRUPTCY — EFFECT OF ASSIGNMENT.— Property not held in the name of the bankrupt at the time of the adjudication of bankruptcy, but which is held for him fraudulently by a third party, does not *ipso facto*, as to the legal title, vest in the assignee by virtue of the assignment under the bankrupt act. There exists in the latter only the right to recover it by proper proceedings in equity, and this right must be exercised before the transfer of the property to a *bona fide* purchaser without notice.
5. EVIDENCE — FAILURE OF A PARTY, WHEN CALLED AS A WITNESS, TO ANSWER QUESTIONS.— The failure of a party to a suit to answer certain questions put to him upon cross-examination before an examiner does not authorize the rejection of his entire testimony on the trial. It was the duty of counsel to move the court for an order requiring him to answer, or in case of his refusal to do so without good cause, to strike out his testimony.
6. RIGHTS OF PURCHASERS OF UNDER-DUE NEGOTIABLE PAPER SECURED BY MORTGAGE.— The general rule, announced above in the first headnote, further considered, and some exceptions and limitations of the doctrine stated.

Myers, Assignee, v. Hazzard et al.

Bill in equity, brought by complainant as assignee in bankruptcy of George Hazzard, to set aside as fraudulent certain promissory notes, and a mortgage given to secure them, upon a herd of cattle, and to subject the interest of the bankrupt in said cattle to the payment of the debts of the bankrupt estate. The bankrupt was at the time of his bankruptcy undoubtedly the owner of a large interest in the herd of cattle, and complainant was clearly entitled to recover that interest as against all the parties concerned except respondent Coates, who claimed to be an innocent purchaser without notice of the negotiable promissory notes above mentioned secured by mortgage upon the cattle, under which mortgage he had taken possession. The cattle being held in the name of the firm of Foster & Struthers, but being in fact in part owned by George Hazzard, were mortgaged to John W. Hazzard to secure a number of negotiable promissory notes, with the understanding that said John W. Hazzard should negotiate the notes and out of their proceeds pay a certain prior incumbrance. These notes and the mortgage securing them were executed January 31, 1879, all the parties to the transaction being at that time aware of the interest of George Hazzard.

Notice of application for order of injunction against disposing of the notes and mortgage in this suit then pending was served upon John W. Hazzard at North Platte, in Lincoln county, Nebraska, on the —— day of March, A. D. 1879, and was served on George Hazzard at Indianapolis, in the state of Indiana, the —— day of ——, 1879. Thereupon George Hazzard returned to the state of Nebraska, and procured John W. Hazzard to go to the city of Chicago, in the state of Illinois, and employed one H. W. Babb, of North Platte, Nebraska, to go with him and answer such questions as should be put to him in regard to the laws of Nebraska. The purpose of such journey was to make a disposal of said securities, and John W. Hazzard and H. W. Babb left North Platte about the thirtieth of March, 1879, and arrived at

Chicago on the evening of April 1, 1879. Injunction was allowed in this cause, restraining, etc., on the thirty-first day of March, 1879, but not served on John W. Hazzard. John W. Hazzard sold said notes and mortgage at Chicago on the third day of April, 1879, for $22,000, to Isaac P. Coates, the defendant.

A large volume of proof was taken upon the question whether Coates was a *bona fide* purchaser of the notes before maturity and without notice, and the question was elaborately discussed by counsel. A further question was also presented, to wit: Whether, if Coates be a *bona fide* purchaser of the notes before maturity and without notice, he is to be protected in his right to the mortgaged property, as against the claim of the assignee in bankruptcy of George Hazzard.

The master found that Coates was an innocent purchaser and that he was entitled to the benefits of the mortgage security.

The case was heard on exceptions to the master's report.

Chapman & Hammond and *Lamb, Billingsley & Lambertson*, for complainants.

E. Wakeley, for respondent Coates.

McCrary, *Circuit Judge.*—It will be observed that this case presents an important question of law respecting the rights of the *bona fide* purchaser of commercial paper secured by mortgage. Assuming that Coates was such a purchaser, and that he had no notice of the fraud (and such the court finds to be the fact), the case turns mainly upon the question, which has been elaborately argued by counsel, whether he is to be regarded in the light also of an innocent *bona fide* purchaser of the mortgage so as to have the right to enforce it as against the assignee in bankruptcy of George Hazzard.

The question, to what extent and under what circumstances the *bona fide* purchaser of negotiable commercial paper se-

cured by mortgage is entitled to the benefits of the mortgage security, unaffected by equities existing as between the original parties, is one of great and growing importance. It is now well settled that the mortgage is only an incident to the debt, and passes with it to the assignee. No formal assignment of the mortgage is necessary. The debt is the principal thing, and the mortgage an accessory, so that the assignment of the debt passes all the mortgagee's interest in the mortgaged property, whether the assignment be before or after the forfeiture. *Langdon* v. *Buell*, 9 Wend. 80; *Gould* v. *Marsh*, 1 Hun, 566; *Jones* v. *Hart*, 3 Johns. Cas. 322; *Ellett* v. *Butt*, 1 Wood, 214; *Gaff* v. *Harding*, 48 Ill. 148; 1 Jones on Mort. secs. 813–822, and cases cited.

Where there is no question as to the validity or construction of the mortgage, or as to the title of the mortgagor as between the original parties to the instrument, there can be none, of course, as between the mortgagor and the assignee of the secured debt. The cases of doubt and difficulty arise where, as between the original parties to the mortgage, there is a question as to its validity, or as to its force and effect, independent of any question affecting the note, or where a third party claims the mortgaged property and denies the authority of the mortgagor to fasten a lien upon it. In such cases, to what extent can the innocent, *bona fide* purchaser of the note before due, be regarded as an innocent purchaser of the mortgage also, and entitled to protection accordingly against equities existing as between the original parties?

We are confronted in the outset by a conflict of authority upon the principal question. In several of the states it is held that the assignee of a negotiable note, secured by mortgage, takes the latter, as he would any other *chose in action*, subject to all the equities which subsisted against it while in the hands of the original holder. The argument in support of this doctrine is, that a mortgage is, in its nature, a non-negotiable instrument, and that the rights of the par-

ties to it cannot be fixed and determined by the law merchant. Mortgages, it is insisted, are not commercial paper, and it is not convenient to pass them from hand to hand so that they may perform the office of money in commercial transactions, as may be done with notes, bills, and the like. It is accordingly held, in the cases now under consideration, that while the purchaser of a note secured by mortgage may be entitled to all the rights of an innocent purchaser of commercial paper, so far as the note is concerned, yet if he seeks to foreclose the mortgage, he may be met by any defense which would have been good as against the original mortgagee. *Johnson* v. *Carpenter*, 7 Minn. 176; *Hostetter* v. *Alexander*, 28 Minn. 559; *Olds* v. *Cummings*, 31 Ill. 188; *White* v. *Sutherland*, 64 Ill. 181; *Fortier* v. *Durst*, 31 Ill. 212; *Sumner v. Waugh*, 56 Ill. 531; *Bailey* v. *Smith*, 14 Ohio St. 396.

On the other hand, it is held by the supreme court of the United States, and by the courts of last resort in a large majority of the states, that an assignee for value of a negotiable note, secured by a mortgage, before due and without notice, takes the mortgage, as he does the note, free from equities existing between the original parties. It is said, in support of this doctrine, that the note, being the principal thing, imparts its character to the mortgage. The mortgage is regarded as following the note, and as taking to itself the same qualities, so that the assignee takes the former, as he takes the latter, free from any existing equities between the original parties.

A leading case upon this subject, and a controlling one, so far as the federal courts are concerned, is that of *Carpenter* v. *Longan*, 16 Wall. 271. In that case the rule just stated was laid down by Mr. Justice Swayne, as follows:

"The assignment of a note under due raises the presumption of the want of notice, and this presumption stands until it is overcome by sufficient proof. The case is a different one from what it would be if the mortgage stood alone, or

the note was non-negotiable, or had been assigned after maturity. The question presented for our determination is, whether an assignee, under the circumstances of this case, takes the mortgage, as he takes the note, free from the objections to which it was liable in the hands of the mortgagee. We hold the affirmative. The contract as regards the note was that the maker should pay it at maturity to any *bona fide* indorsee, without reference to any defenses to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfilment of that contract. To let in such a defense against such a holder would be a clear departure from the agreement of the mortgagor and mortgagee, to which the assignee subsequently, in good faith, became a party. If the mortgagor desired to reserve such an advantage, he should have given a non-negotiable instrument. If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who 'puts trust and confidence in the deceiver should be a loser, rather than a stranger.' "

In order to understand the scope of this opinion, it is necessary to note that the defense in the case as against the mortgage was, in substance, that, as between the original parties, it had been satisfied. The mortgagor alleged that at the time of the execution of the mortgage she delivered to the mortgagee certain property, which he agreed to sell and apply the proceeds to the satisfaction of the note, and that, instead of so doing, he converted the property so delivered to his own use. The sole question was, whether the equitable satisfaction of the mortgage in this way could be set up as against the assignee. This case is not, therefore, as some lawyers have assumed, authority for the doctrine that the *bona fide* purchaser, without notice, of a negotiable under-due note, secured by mortgage, holds the mortgage precisely as he holds the note, subject to no defenses whatever that would not be good against the latter. In that case there was no question as to the title of the mortgagor at

the time that the mortgage was given, nor as to the rights of any third party with respect to the mortgaged property, nor as to the validity or construction of the mortgage itself. It seems manifest that it was not the intention of the court to assert broadly the rule that, because a mortgage is given to secure a negotiable note, which, before maturity, it assigned to a *bona fide* purchaser, therefore no objection can be raised to the mortgage, unless it would be an objection constituting a defense to the note in the hands of such a purchaser. The court decided the case before it, and was careful to qualify its opinion by the words "under the circumstances of this case." The general rule announced in *Carpenter* v. *Longan* has been adopted in Massachusetts, Maine, Michigan, Wisconsin, Nebraska, Iowa, Missouri and other states. See Jones on Mort. sec. 834, and numerous cases cited.

But the doctrine has not yet been established as the law of New York or Pennsylvania. *Union College* v. *Wheeler*, 61 N. Y. 88; *Hartman* v. *Gerker*, 49 Pa. St. 282.

For our present purpose we will assume, as we are bound to do, the soundness of the general rule announced in *Carpenter* v. *Longan*, and similar cases, and address ourselves to the task of determining, if we can, its true meaning and its proper limitations. Although the general language employed in some of the cases might seem to justify the inference that a mortgage transferred with a negotiable note before due is to be treated for all purposes as commercial paper, it is manifest that the rule thus broadly stated cannot be maintained upon principle. In many of the cases the rule is stated to be, that the mortgage is regarded as following the note, and as taking the same character; but it must, of course, be understood that the mortgage takes the character of a negotiable note only in so far as in its nature it is capable of having that character imputed to it, and therefore the rule must be subject to certain modifications or exceptions. In any suit brought by the assignee of the note to foreclose

the mortgage, the mortgagor may be heard to assert that the mortgage is invalid as to all, or part of the property, by reason of anything that appears upon the face of the mortgage, or by reason of anything that the assignee is bound by law to know, whether the same constitutes a defense to the note or not. A third party may be heard to assert, as against the validity of such a mortgage in the hands of the assignee, that the mortgagor, at the time of the execution of the mortgage, had no power to execute it. The mortgage in the hands of the assignee, like the note, is freed from equities existing as *between the original parties.* This being so, no defense to the mortgage, on the ground of fraud, duress or want of consideration, could be admitted as against the assignee; nor could the defense of payment or satisfaction, nor of a release of the mortgage, as between the original parties, nor of any other similar matter, be set up. But there may, beyond question, be defenses to a mortgage in such a case, that cannot be defenses to the note — defenses the force and effect of which cannot be determined by an appeal to the principles of the law merchant. Of this character are objections which relate to, and in the nature of the case can only relate to, the mortgage, its construction, validity, or force and effect. They may be objections which third parties only are interested in raising. We cannot give to the mortgage *all* the properties of negotiable paper, nor apply to it *all* the principles of the law merchant, without a disregard of elementary principles.

A few examples may serve to illustrate this proposition. There are in most, if not in all, of the states statutes designed for the protection of the homestead rights of the family of the owner. These statutes generally provide that a mortgage executed by the husband alone, without the concurrence of the wife, shall be void. If, in a state where such a statute prevails, the husband executes his negotiable note and a mortgage to secure the same, without the wife's concurrence, upon the homestead occupied by himself and family, there

can be no reasonable doubt that the mortgage would be void, even in the hands of a *bona fide* purchaser of the note before due. The assignee of the mortgage would be bound to inquire whether the property mortgaged was a homestead, and would have constructive notice that it was occupied as such; while the purchaser of a negotiable note is not bound to make any inquiries, but on the contrary, as we shall presently see, is protected unless he acts in bad faith.

A similar question may arise where the mortgagor has the legal title, but where a third party is in possession claiming an interest. In such a case the possession of the third party would be notice of his claims, and a purchaser or mortgagee would take subject to them. Doubtless the assignee of the mortgage debt would take the mortgage with like notice; but, if so, he would not be protected to the same extent and in the same way as a *bona fide* purchaser of negotiable paper before due.

It is probable that another modification of the general rule we are considering must be admitted in cases arising out of the entry of satisfaction by a mortgagee after he has assigned the debt secured by the mortgage. If we are to apply the rule strictly, it will follow that, in the absence of a statute requiring assignments of mortgages to be recorded, the purchaser of the mortgaged property is bound to inquire whether the mortgagee is still the holder of the notes before relying upon a release of the mortgage by him. This upon the ground that in such a case the notes are the evidence of the authority of the mortgagee to enter satisfaction of the lien, and so it has been held. *Catherwood* v. *Burrows*, 7 Rep. 492; *Crosby* v. *Roup*, 16 Wis. 616; *Martineau* v *McCullom*, 4 Chand. 152; *Cornell* v. *Hickens*, 11 Wis. 353; 1 Jones on Mort. sec. 314.

It would seem that the rule laid down in these cases results very naturally from the doctrine that an innocent purchaser of a negotiable note, secured by mortgage, is an innocent purchaser of the mortgage also, and takes it unaf-

fected by any equities between the mortgagor and mortgagee. And yet it has not been adopted with unanimity. On the contrary, it has been held frequently that an assignment of the mortgage by transfer of the debt is effective only as between the parties and those having notice of the transfer of the notes. It is said with much force that a subsequent purchaser of the mortgaged property is not bound to take notice of the assignment by transfer of the notes alone. "The assignee of the notes can easily protect himself by requiring an assignment of the mortgage and recording it, and thus give notice of his right; and if he omit to do this, he should be the party to suffer for the negligence." 1 Jones on Mort. sec. 820; *Bank* v. *Anderson*, 14 Iowa, 559; *Ayers et al.* v. *Hughes et al.* 60 Ind. 452.

The doctrine of these cases may well be maintained upon the principles of equity, that where one of two innocent persons must suffer loss, and one of them has been negligent and the other diligent, the former shall suffer. But the application of this rule presupposes that the purchaser of the notes *is* chargeable with negligence in not obtaining an assignment of the mortgage and placing the same upon the record, which can scarcely be true, if, by the purchase of the notes, he becomes entitled to the mortgage without an assignment, and is to be protected in his rights under it against every defense that would not be good against the notes. The difficulty lies in the attempt to treat a mortgage for all purposes as commercial paper.

Perhaps the question most frequently arises in cases involving the rights of third parties in and to the mortgaged property. These cases generally present, in some form, the question of the title of the mortgagor or of his right to bind the property by the mortgage, or a question of priority as between the different lien-holders. The general rule is, that the mortgage binds only the interest of the mortgagor at the time of its execution; but an important exception arises in those cases where the mortgagor, though not the

owner in fact, is vested with the legal title and the ostensible ownership of the property mortgaged, so that the real owner is estopped to assert his right to it as against a mortgagee in good faith, for a valuable consideration, and without notice. For the purposes of this doctrine, a mortgagee is a purchaser, and the question whether he is an innocent purchaser, without notice, will be determined by the familiar principles applicable to all other purchasers. It would seem, also, to follow, as a necessary consequence of the prevailing doctrine, that the *assignee* of the mortgage, whether by a formal assignment or by purchase for value before maturity and without notice, of the note which it secures, is to be regarded also as a purchaser of the mortgaged property within the rule. Keeping these rules in view, we shall have constantly in mind the principles upon which to determine every case in which the title of the mortgagor is sought to be attacked by a third party. The application of this doctrine may be illustrated by the case of a trustee in possession and having all the *insignia* of title, but who, in fact, holds in secret trust for a third party. If such a trustee executes a mortgage for a valuable consideration to an innocent mortgagee, who takes it and advances money or gives credit upon the faith of it, the real owner will be estopped to question the validity of the mortgage in the hands of the mortgagee or his assignee, on the ground that the mortgagor was not the owner. Such mortgagee, as we have already seen, is a purchaser; and it is well settled that where a trustee in possession of the trust estate makes a *bona fide* conveyance of it, for a valuable consideration, to a purchaser who has no notice of the trust, the title of the purchaser will be good both at law and in equity, for he has equal equity with the *cestui que trust*, and the legal conveyance gives him priority at law. Hill on Trustees, 282, 509 *et seq.*

Another numerous and important class of cases arises out of conveyances made without consideration and with intent to defraud creditors. The grantee in all such conveyances

takes the property in trust for the grantor or his creditors; but, inasmuch as he is clothed with the legal title, he may make a valid mortgage, for a valuable consideration, to a third party who has no notice of the fraud or the trust; and in such a case neither the original owner nor his creditors (though the latter be entirely innocent) can set aside the mortgage on the ground that the mortgagor had no title to mortgage.

The original owner is estopped because of his fraudulent act in vesting the title in the mortgagor; the creditors are estopped because their equity is not superior to that of the mortgagee, and for the additional reason that the latter holds under one who had the legal title. If, however, a creditor has, before the mortgage is executed, taken steps to set aside the fraudulent conveyance and to subject the property to the payment of the debts of the fraudulent grantor, then a question of more difficulty may arise. It is generally, however, one which resolves itself simply into a question of notice, and it will in general be determined by settling the question whether the mortgagee is a purchaser for value and without notice. If the creditor has instituted legal proceedings to set aside the sale before the execution of the mortgage, the question will be whether the mortgagee had either actual or constructive notice of such proceedings. It is held that where a fraudulent mortgage is given to secure a negotiable promissory note, void as between the parties, if a creditor or assignee in insolvency *seizes the property and files a bill to set aside the mortgage before* the assignment of the note and mortgage, the assignee, though he takes for a good consideration and without actual notice, cannot hold the property. If, however, the purchaser of the note and the mortgage had acquired title in good faith and for a valuable consideration before any steps had been taken to avoid the mortgage, he would have stood on a different ground. Jones on Chat. Mort. sec. 508; *Bigelow* v. *Smith*, 2 Allen (Mass.), 264.

In making the application of these rules, it will be found necessary to observe the distinction between mortgages of real estate and mortgages of personal property. The general principles above indicated apply alike to all mortgages, but the particular rules by which the questions as to notice and as to what constitutes, as to purchasers or mortgagees, sufficient evidence of title in the mortgagor, may not be the same. Purchasers or mortgagees of real estate may, ordinarily, rely on the record title, while purchasers or mortgagees of personal property must, as a rule, take the chances as to the vendor's title. If a negotiable promissory note, secured by mortgage upon personal property, be assigned for value, before maturity, to a purchaser without notice, to what extent is such purchaser bound to inquire as to the title of the mortgagor to the mortgaged property? As, for example, suppose the case of an insolvent, who, in contemplation of bankruptcy, fraudulently transfers his personal property to another to keep it from coming into the hands of his assignee in bankruptcy, and thereafter goes into bankruptcy. In such a case it is, of course, clear that the assignee could recover the property from the fraudulent vendee; but if he has mortgaged it to secure a negotiable note, which is transferred before due to an innocent purchaser for value, will the latter be protected as against the claims of the assignee?

Each case involving questions of this character must be determined upon the rule above stated, viz., that the assignee of the note is to be regarded as a purchaser of the mortgaged property from the mortgagor, and to be protected to the extent that any other purchaser would be protected, and to that extent only. The purchaser of personal property from a fraudulent vendee, in good faith and without notice of the fraud, is unaffected by the equities of third parties of which he has no notice. *Jarrell's Assignee* v. *Harrall*, 1 Woods, 476; *Pratt* v. *Curtis*, 6 Bank. Reg. 139. Applying this rule to the case of the assignee of a negotiable note,

secured by mortgage upon personal property under such circumstances as to make him the purchaser of the property, we reach the conclusion that, in such a case as that last stated, he is entitled to protection.

Our conclusions in this case are as follows:

1. The respondent Isaac P. Coates is a *bona fide* purchaser of the notes described in the pleadings, before maturity and without notice, within the rule established by the decision of the supreme court of the United States in *Murray* v. *Lardner*, 2 Wall. 110, and he is entitled to protection accordingly.

2. The said respondent Coates, as the *bona fide* purchaser of said notes before maturity and without notice, took the mortgage, as he did the notes, freed from equities arising between the previous parties thereto, and also freed from any latent equity existing in complainant at the time of the assignment of the notes of which he, said Coates, had no notice. *Carpenter* v. *Longan*, 16 Wall. 271; *Murray* v. *Lylburn*, 2 Johns. Ch. 441.

3. The said Coates, as the assignee of said notes and mortgage, under the circumstances developed in proof, is entitled to the same protection that would be accorded to the purchaser of property from a fraudulent vendee, in good faith and without notice of the fraud. Such a purchaser would be unaffected by latent equities of third parties of which he had no notice. *Jarrell's Assignee* v. *Harrall*, 1 Woods, 476; *Pratt* v. *Curtis*, 6 Bank. Reg. 139.

4. The title of Coates to the notes, and his protection as a *bona fide* purchaser, was not affected by the pendency of this suit. Negotiable instruments are not subject to the rule of *lis pendens*. Wade on Notice, sec. 372; *Day* v. *Zimmerman*, 68 Pa. St. 72; *Kellogg* v. *Foucher*, 23 Wis. 21.

5. Since at the time of the assignment of the notes and mortgage to Coates the mortgaged property was not *in custodia legis*, but was in the possession of the mortgagors, the

same was not, in the hands of Coates, subject to the result of this suit, nor was he charged with notice of this suit.

6. Property held in the name of John W. Hazzard at the time George Hazzard was adjudicated bankrupt did not *ipso facto* vest in the assignee in bankruptcy. There existed in the latter only the right to recover it upon making proof that it was in equity the property of the bankrupt. This right the assignee was bound to exercise before the transfer of the property to a *bona fide* purchaser without notice of his claim. After such transfer he cannot recover it from such purchaser. The assignee of the notes and mortgage (Coates) was such a purchaser, or, if not technically such, he is entitled to the same protection.

7. The rights of Coates as purchaser of the notes in question are not affected by the fact that said notes were in equity the property of George Hazzard, or of his assignee in bankruptcy, nor by the fact that the notes in lieu of which they were executed may have been indorsed in blank and delivered to said George Hazzard. The purchaser, in good faith and without notice, of negotiable notes before maturity from the payee, is entitled to protection.

8. The failure of Coates to answer, as a witness, certain questions put to him upon cross-examination does not justify the court in rejecting his entire testimony on the trial. It was the duty of complainant's counsel to move the court for an order requiring him to answer, or in case of his refusal to do so, to strike out his entire deposition.

It follows from these conclusions that the exceptions to the master's report must be overruled, and that there must be decree as recommended by him.

LYSTER, Adm'r, *v.* STICKNEY *et al.*

(District of Colorado. June, 1882.)

1. PLAINTIFF MAY DISMISS, BUT PAPERS REMAIN AND MAY BE USED AS EVIDENCE.— A complainant has an undoubted right to dismiss his suit, either in whole or in part. But the pleadings will remain a part of the record, and, if material and competent, may be relied upon by the adverse party as evidence in the case.
2. AMENDMENT — AS TO SUBSEQUENT FACTS.— In an action to cancel notes, etc., alleged to have been procured by duress, it may be competent as matter of evidence to prove the subsequent killing of the party who executed the notes by the person charged with the duress, but this is not a matter proper to be set up in an amended complaint by the administrator of the deceased.
3. AMENDMENT — INSOLVENCY OF DECEASED.— But the administrator in such case may, by way of amendment, set up the insolvency of his intestate at the time the papers were executed.
4. INJUNCTION against the negotiation of notes, etc., alleged by a sufficient bill to have been executed under duress, will not be dissolved upon the face of the papers.

MCCRARY, *Circuit Judge (orally).* — In the case of Lyster, administrator, against Stickney and others, several motions have been argued and submitted to the court.

The first one is an application on the part of complainant to dismiss portions of the bill. He asks leave to dismiss the first, and part of the third, counts or subdivisions. The bill having been brought in the state court, under the laws of the state, contains several separate and distinct causes of action, set forth in separate divisions. It is a suit brought to set aside certain conveyances of real estate, and to cancel certain promissory notes, alleged to have been executed to the defendant Stickney by the original complainant.

The portions of the bill which the plaintiff now seeks to dismiss charge what may be termed blackmail; that is, they allege that the defendant Stickney falsely accused the original complainant in this case with having debauched his wife, and other matters of a similar tenor, and thereby induced him to execute these papers.

There is no doubt but that the complainant has a right to dismiss his suit in whole or in part, and we are, therefore, very clearly of the opinion that he may dismiss the portions of the bill indicated in his application. Of course, the pleadings will not be removed from the files, and will remain a part of the record. It is said on the part of the defendant that the allegations in question are important as matters of evidence in the case. If so, he will not be deprived of any benefit he is entitled to on that account. It is a well-settled rule of practice, and one to which we would allow no exception, that the dismissal of a suit or of a part of a cause of action, or the withdrawal of a pleading, does not authorize the removal of the pleading itself, unless the court shall, for good reason, order that it be done. It remains a part of the record, and it may be relied upon if it is material and competent as evidence in the case. So that the application to dismiss part of the bill is allowed.

There is, furthermore, an application to file a supplemental bill. By this supplemental bill, the present complainant, the administrator of the original complainant, seeks to set up two facts which he thinks are material. It having been alleged in the original bill that the deed and deed of trust and notes were executed under a threat made by the defendant, that he would take the life of the original complainant if the papers were not executed, and that he would take his life if the notes were not paid at maturity, the present complainant now asks leave to file a supplemental bill alleging that in pursuance of such threat the defendant did, subsequently to the commencement of this suit, take the life of the original complainant. It is said that this fact is competent to show a continuing duress. If it is competent at all, it is competent as a matter of evidence, and not as a part of the complainant's cause of action. The rights both of the original complainant, and of the present complainant as his administrator, must depend upon the facts as they existed when the conveyances and the notes were executed. Subse-

quent facts may be competent testimony in the case to show the truth or falsity of the allegations of the bill concerning the facts as they existed at the time the papers were executed. Evidence is not to be pleaded, and if this particular fact of the subsequent killing of the complainant is admissible, it is only as evidence to establish the allegations of the original bill. It is not proper, therefore, that this fact should be pleaded.

The application for leave to amend the bill, by alleging the subsequent killing of the original complainant, is denied.

The other fact which the defendant seeks to set up by way of amended bill, is that Campau, the original complainant, was, at the time of the execution of these papers, insolvent and largely indebted, and that therefore the conveyances were void as against his creditors, who are now represented by the administrator, who has been substituted in lieu of the original complainant.

We think that this amendment may be made. It is not necessary now to determine how far it may be material, or to what extent it will determine the final rights of these parties, but the fact, if it be a fact, that Campau was insolvent and largely indebted at the time he made these conveyances, may be alleged, and the court will reserve the consideration of that fact, and the rights of parties upon it, if it be established by proof. The permission to amend in this respect is allowed.

The remaining matter is the motion of the defendant to dissolve the injunction. There was an injunction allowed against the negotiation of these promissory notes, which were negotiable, and which were not due at the time the original bill was filed, and some of which are not yet due. After the amendments permitted by the order already made, the bill stands upon its face a good bill, alleging the execution of these instruments under duress, and a threat to take the life of the original complainant if he did not execute them. It is, therefore, upon its face, a perfectly good bill.

There is no doubt whatever that any contract executed under a threat to take the life of the party who executes it is utterly void, and may be set aside upon the application of any party injured. If it shall appear upon the testimony that these papers were executed without duress as a part of a compromise of a claim against the original complainant for debauching the wife of defendant Stickney, it is doubtless a case with which a court of chancery should have nothing whatever to do. But that does not appear upon the bill as it now stands, and we hold that the bill upon its face is sufficient, and that the motion to dissolve the injunction must be overruled, there being no showing outside of the bill itself.

MOONEY *v.* HUMPHREY *et al.*

(District of Colorado. June, 1882.)

1. STATE STATUTE — CONSTRUCTION OF BY STATE COURT BINDING ON FEDERAL COURT.— In questions involving the construction of the statute law of a state, the United States courts are bound by the decisions of the supreme court of the state, and will receive the same as conclusive.
2. SAME — CORPORATIONS.— This doctrine is especially applicable to a decision of the highest court of a state affirming the validity of the organization of a corporation of the state.

On motion for new trial.

MCCRARY, *Circuit Judge (orally).*— In this case there is a motion for a new trial, and to enter a verdict for the defendant. It is a suit brought by the plaintiff against the several defendants upon a bill of exchange. The defendants were the incorporators of a company which claims to be a corporation under the laws of Colorado. The suit is based upon the theory that there is no corporation, that the organization is void, and that the incorporators are liable, as partners, upon this contract. It is claimed, on behalf of the

plaintiff, that the organization is not a legal corporation of Colorado, because the law of the state, respecting the mode and manner of organizing corporations, has not been complied with, in this, that the certificate of incorporation does not state that the stock shall be assessable or non-assessable.

There is a provision of the statute that in every certificate of incorporation there shall be a statement showing whether the stock is assessable or not assessable. That is one ground upon which it is claimed that this is not a legal corporation; another is, that the incorporators are all non-residents of this state, that they reside in New Jersey, that the certificate was executed and acknowledged in New Jersey, that the place of business is in New Jersey, the books are kept there; they had an agent in Colorado to transact their business, and that is all.

Upon these grounds the plaintiff claims that this is not a corporation, and that, therefore, these defendants who are the incorporators, and who made this contract in the corporate name, are liable to him as partners. This identical suit was originally brought in the state court; there was a trial there, and judgment for the plaintiff. It was taken up on a writ of error to the supreme court of Colorado, and that judgment was reversed, the supreme court of the state passing upon all the questions to which I have called attention, and holding that the corporation is a legal one, and that the suits should have been brought against the corporation, and not against the incorporators as partners. That ruling will be found reported in the case of *Humphrey* v. *Mooney*, 5 Col. 282. And now the question is, whether this court is bound by that ruling of the supreme court of Colorado, and must follow it as a rule of decision in this court.

We are clearly of opinion that we are bound by it. The question, what constitutes a corporation of a state, is necessarily a question depending upon the construction of the laws of the state. Corporations in this country are created by statute, and state corporations are created by state stat-

utes. An examination of the opinion of the supreme court of Colorado will show that it is a construction of the law of this state upon the subject of corporations. As such, we are clearly bound by it upon general principles, and especially in cases of this character.

The supreme court, in the case of Secombe against the railroad company (23 Wall. 108), held that "when the question is, whether, under the constitution and laws of a particular state, a company professing to be a corporation is legally so, this court will receive, as conclusive of the question, the decision of the highest court of the state, deciding in a case identical in principle in favor of the corporate existence."

It also falls clearly within the general principle that the federal courts are bound to follow the decisions of the state courts construing their own constitution or statutes. It is clearly within the evil that is intended to be prevented by this rule, because if we should hold this organization to be void and no corporation, while the state courts hold it valid, it would result that a non-resident creditor, who could invoke the jurisdiction of this court, would be able to sue stockholders, and enforce claims against them as partners, while a citizen of Colorado would be denied that right.

Upon the whole case, we are constrained to hold that the motion for a new trial must be sustained, and a verdict must be entered for the defendant; and it is so ordered.

Wells, Smith & Macon, attorneys for plaintiff.

L. C. Rockwell, attorney for defendants.

Miller *v.* Union Pacific Railway.

(District of Colorado. June, 1882.)

1. Contributory Negligence — Master and Servant. — When the master or another servant standing toward the servant injured in the relation of superior or vice-principal, orders the latter into a situation of danger, and he obeys and is thereby injured, the law will not charge him with contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even under orders from one having authority over him.

On demurrer.

McCrary, *Circuit Judge.*— The complaint avers, among other things, the following facts:

First. That the defendant contracted with plaintiff for his services as a carpenter, to work at his trade for defendant, and that by the terms of the contract plaintiff was to report to and work under the orders and instructions of a foreman, employed by the company to superintend and oversee the carpenter work of said company at a certain coal mine, situated on a branch line of defendant's railroad, in Elbert county, Colorado.

Second. That plaintiff was directed to, and did, proceed to said coal mine, and there reported to one Miles McGrath, the foreman of said company, there engaged in the superintendence and oversight of the carpenter work of said company at said coal mine, and who was also, in like manner, a foreman of said company to superintend, oversee and perform work for the company, with carpenters under him, at other places, as he might be from time to time directed by the company.

Third. That by said contract plaintiff was to continue in the service or employment of said company until he should voluntarily withdraw from the same, or until he should be discharged from the same by order or direction of the said foreman, Miles McGrath.

Fourth. That plaintiff entered upon service in pursuance of the contract, and commenced work under the orders of said McGrath, and so continued until January 19, 1880, when he was injured, as in the complaint stated.

Fifth. That the company had, upon its said branch line, a certain four-wheeled platform car, commonly denominated a "push-car," which was wholly unprovided with any machinery or other mechanical means of propulsion or movement, and was designed to be and was moved and propelled along the track by the hands of laborers or men walking behind and pushing the same, except at those places where, by the downward grade or descent of the track, the same would be moved and carried along by the law of gravitation.

Sixth. The said car was provided with no brakes or other means of checking its speed when in motion.

Seventh. That said car had been and then was in frequent and common use by said company, in the departments of repair and construction of said company, upon said branch road and upon a certain section of the main line, and was furnished by said company to be so used, in the movement and transportation of tools and materials, and as occasion might serve or require, of laborers and workmen upon and along said branch road and a portion of said main line.

Eighth. That on two occasions plaintiff had ridden upon said car, the same being propelled by hand from the station to said coal mine.

Ninth. That, as plaintiff has since been informed and believes, push-cars designed and furnished to be used as above described, when they are to be used upon steep grades, are usually furnished with brakes, and that the grade upon the branch aforesaid was steep and heavy.

Tenth. That on the nineteenth of January, 1880, the foreman above named received a telegraphic order from the defendant company to take the carpenters so at work under him, being three in number besides plaintiff, and proceed with them, by the next eastern bound train over said company's main

line, to a station called Cheyenne Wells, distant about one hundred miles, there to perform certain carpenter work for the company.

Eleventh. That thereupon said foreman caused the said push-car to be taken to the coal mine, and being there present in a position of authority, ordered the plaintiff and the other carpenters in great haste to pick up and pack their tools, bedding, blankets, etc., and put the same on the push-car, for transportation, and also ordered the plaintiff and two of his companions to get upon said car, which order they obeyed, and thereupon the foreman himself got upon said car and started it down the grade, with a view to reaching the station in time for the east bound train. The car being heavily loaded, and having no appliances to control its velocity, soon acquired a great and dangerous rate of speed, and was approaching the station, where, by collision with other objects on the track, there was great danger to the persons on board. To avoid this greater danger, the plaintiff jumped from the car and was injured.

Twelfth. That plaintiff was not familiar with the manner of using and operating push-cars, and fully believed it was safe for him to obey the order of the foreman and get upon said car.

The contention of the counsel for the defendant is, that the complaint shows upon its face that plaintiff was guilty of contributory negligence. That the act of going upon the push-car, loaded as it was, and proceeding down a steep grade without the means of retarding or stopping its movement, was an act of negligence, is clear. *Miller* v. *U. P. Railway Co.* 2 McCrary, 87.

This is not denied, but the plaintiff insists that the allegations of the present complaint, taken to be true, show that the negligence which caused the injury was wholly the negligence of the defendant company. In determining this question, we are to assume for the present that the company furnished the push-car to be used, among other things, for the

purpose of transporting workmen to and from their work; that it had been used for that purpose; that the foreman, McGrath, had authority to order and direct the plaintiff to go upon it, which order he was bound to obey, upon peril of dismissal from the service; and that plaintiff was unfamiliar with the operation of such car, and ignorant of the fact that the car was without brakes or other means of controlling its movement. Under such circumstances, can it be said, as a matter of law, that he was guilty of negligence in obeying the foreman's order to go upon the car? We think not. The true rule is, that if a master or another servant standing toward the servant injured in the relation of superior or vice-principal, orders the latter into a situation of danger, and he obeys and is thereby injured, the law will not charge him with contributory negligence unless the danger was so glaring that no prudent man would have entered into it, even under orders from one having authority over him. Thompson on Negligence, vol. 2, pp. 974, 975, 976.

There may be cases in which a court can say, as matter of law, that a servant receiving an order from his master, or from a superior, is guilty of negligence in obeying it, but the present is not such a case. The law will rarely declare the act of obedience negligence *per se*. If the circumstances be such that men of ordinary intelligence may honestly differ as to the question of negligence, it must be left to the jury. *Salor* v. *R. R. Co.* 52 Ill. 401; *O'Neil* v. *R. R. Co.* 1 McCrary, 505.

The demurrer to the complaint must be overruled, and it is accordingly so ordered.

L. S. Dixon and *G. H. Gray*, for plaintiff.

Willard Teller, for defendant.

RENWICK *v.* WHEELER.

(District of Iowa. October, 1880.)

1. SATISFACTION OF JUDGMENT — PRESUMED FROM LAPSE OF TIME.— Satisfaction of a judgment may be presumed from lapse of time in a shorter period than twenty years, if circumstances are shown which render satisfaction probable.
2. POWER OF ATTORNEY — GENERAL AUTHORITY — CONSTRUCTION.— A power of attorney, general in terms, will be strictly construed, and the authority conferred will not be extended beyond that which is given in terms, or which is necessary or proper for carrying the authority so given into full effect. General language used in connection with a particular subject matter will be presumed to be used in subordination to that matter, and is to be limited accordingly.
3. SAME — SUBJECT MATTER.— Where the particular subject matter of a power of attorney was the business of one W., in the state of Iowa, relating to his real estate, including selling, mortgaging, leasing, collecting moneys due for rents, or as purchase money, including the satisfaction of mortgages, *held*, that a clause in such power of attorney, giving the agent "unrestricted power and authority," and power to act "as general attorney in fact," was sufficient to authorize him to settle a mortgage debt by taking the mortgaged property in full satisfaction.
4. COMPROMISE OF DEBT — CONSIDERATION.— The agreement of a mortgagor to consent to a decree of foreclosure and a conveyance of the land mortgaged in full satisfaction of the mortgage debt, is a sufficient consideration for an agreement on the part of the mortgagee to take the land in full satisfaction of such debt.

Bill in equity. The facts sufficiently appear in the opinion.

MCCRARY, *Circuit Judge.*— This is a bill in equity praying the cancellation of a certain judgment appearing upon the records of the district court of Scott county, Iowa, in favor of the defendant and against the plaintiff, on the ground that the same has been settled and satisfied. The judgment was rendered on the eighteenth day of February, 1861, in a suit for the foreclosure of a mortgage upon certain real estate. The mortgaged property was sold under the judgment in 1861, and bought in by Wheeler for $700, and the sheriff's

deed was immediately made to him. This left a balance unsatisfied on the record which now amounts, including interest at ten per cent., to something over two thousand dollars. No attempt was ever made to collect this balance until December, 1878, about seventeen years after the date of the judgment, when a general execution was issued and attempts were made to enforce its payment, which led to the filing of this bill, and the allowance of a temporary injunction to restrain, until further order, the collection of the judgment. The note and mortgage on which said judgment of foreclosure was rendered were made by complainant James Renwick to defendant Wheeler, April 8, 1857, for the purchase money of a piece of land in Davenport, then purchased by Renwick from Wheeler through Wheeler's agent and attorney in fact, Erastus Ripley. Wheeler resided in Pennsylvania and Ripley in Davenport, Iowa. Renwick, who also resided in Davenport, made certain payments on the mortgage debt, amounting in the aggregate to $565. The sum secured by the mortgage was $1,400 with interest, and the mortgage covered, besides the land purchased from Wheeler, another adjoining tract for which Renwick had paid $600. Before the commencement of the foreclosure suit Renwick had become financially embarrassed, and was unable to pay the balance of the debt; and he alleges in the present bill that he entered into an agreement with Wheeler, through his agent Ripley, that Wheeler should take the entire mortgaged property in satisfaction of the balance due; and that to carry out this agreement (Renwick being unable to make a good title by deed on account of judgments against him), an amicable foreclosure was had, in which the judgment in question was rendered by default, and was left unsatisfied, after the sale, by negligence or oversight.

The controversy here is, (1) as to the truth of this allegation; and (2) as to its sufficiency as a matter of law to entitle the complainant to the relief sought.

Without going here into a discussion of the question of

fact, it is sufficient to state that, upon the whole case, the court is of the opinion that the weight of evidence is with the complainant; but if, upon the direct testimony of witnesses, this were doubtful, the long lapse of time between the rendition of the judgment and the issuing of the general execution is a circumstance of sufficient significance to turn the scale in the complainant's favor. It is well settled that satisfaction of a judgment may be presumed in a shorter period than twenty years, if other circumstances are shown which render satisfaction probable. *Hendricks & Cooper* v. *Wallis*, 7 Iowa, 224; Angell & Ames on Limitations, secs. 171, 172.

It is insisted on behalf of defendant that it does not appear that Ripley, the agent of Wheeler, had authority to make the contract relied upon. This depends upon the construction of the power of attorney under which Ripley acted. That instrument, which is before us, after authorizing the agent to sell, convey or mortgage any real estate belonging to Wheeler within the state of Iowa, and to collect all sums due on that account, provides as follows:

"And we do further constitute the said Erastus Ripley our general attorney in fact to transact any or all business for us, or either of us, of any kind whatsoever, in the state of Iowa; to rent houses and sign leases, and to collect money, execute receipts for the same, and to satisfy any mortgages made or to be made to us, or either of us, upon any lands in the state of Iowa; it being the true intent and meaning of this instrument to confer upon the said Erastus Ripley full and unrestricted power and authority to act for us in all matters of every kind whatsoever arising, or that may arise, in the said state of Iowa."

It is said that the general language in this power of attorney is restrained by the special and specific authority elsewhere in the same instrument conferred. The general rule is, that general terms following, in the same instrument, words which confer a specific authority, are to be held subordinate to and as limited by the specific authority. Instruments of this character are strictly construed, and the authority is never

extended beyond that which is given in terms, or which is necessary or proper for carrying the authority so given into full effect. Story on Agency, sec. 68. And language, however general in its form, when used in connection with a particular subject matter, will be presumed to be used in subordination to that matter, and therefore is to be construed and limited accordingly. Id. sec. 62.

Applying these rules to the power of attorney under consideration, it appears that the particular subject matter was the business of Wheeler, in the state of Iowa, relating to his real estate, including selling, mortgaging, leasing, collecting moneys due for rents or as purchase money, and including the satisfaction of mortgages. With respect to all business of this general nature within the state of Iowa, Ripley, as Wheeler's agent, had "unrestricted power and authority," and was to act as his "general attorney in fact." The settlement in question was a transaction relating to the particular subject matter of the agency; and therefore the agent had discretionary power to accept the mortgaged premises in full for the debt.

It is also insisted that no sufficient consideration for the contract relied upon has been shown. This point is not well taken. The agreement to give up without contest all the land covered by the mortgage in satisfaction of the debt, was a good and sufficient consideration for the agreement to release. The value of the land does not appear, nor is it material. It may have been more than the mortgage debt, or it may have been regarded as equal to it. The time of obtaining title and possession may have been regarded of great importance. There is some evidence tending to show that there was a defense of usury to part of the claim, which was waived. But independently of this, we are of opinion that there was a sufficient consideration.

Decree for complainant.

John N. Rogers, for complainant.

L. M. Fisher, for defendant.

WALLACE *v.* GERMAN AMERICAN INSURANCE COMPANY.

(Northern Division, District of Iowa. July, 1882.)

1. INSURANCE — CONSTRUCTION OF POLICY. — A policy of insurance, being a contract drawn by the insurance company embodying its own terms and conditions, will be construed strictly in favor of the assured; and if the language employed leaves a question of interpretation in doubt, that construction adopted and acted upon by him will be upheld.
2. SAME — SAME — ARBITRATION. — Where a policy of insurance provided that, in case of differences arising as to any loss or damage, the matter shall, at the written request of either party, be submitted to arbitration, and that no suit to recover damages shall be maintainable until after an award shall have been obtained fixing the damages in the manner above provided, *held*, that the assured had reasonable ground for supposing that, if neither party demanded an arbitration, the ordinary remedy by suit remained; and the assured having acted upon that construction, the court should adopt it.
3. VERDICT — SPECIAL FINDINGS — NEW TRIAL. — Where there is a special verdict settling the facts so as to render the law questions raised on motion for new trial immaterial, such questions will not be considered by the court.

Action on policy of fire insurance. Trial, and verdict for plaintiff. Motion for new trial. The facts sufficiently appear in the opinion.

Shiras, Van Duzee & Henderson, for plaintiff.

Hubbard & Clark and *Henry Rickel*, for defendant.

MCCRARY, *Circuit Judge.*— This is an action upon a policy issued by defendant to plaintiff to insure him against loss by fire upon a certain building therein described. There was a trial by jury and a verdict for plaintiff for $1,788.78. The case is now before the court on a motion for a new trial.

It is insisted that, under the terms of the policy sued on, an arbitration fixing the amount of the loss is a condition precedent to plaintiff's right to maintain this action. The same question was raised at an early stage of this proceed-

ing by demurrer to the replication, and was decided adversely to the defendant. 1 McCrary, 335. We are asked to reconsider the question upon the ground that it was not fully argued by counsel at the time of the hearing upon demurrer. There can, we think, be no valid objection upon the part of the court to reconsidering upon final hearing any question passed upon in the preliminary proceedings, especially in a case where our judgment must be final, the sum involved not being sufficient to authorize a writ of error.

The policy contains the following provisions. In the ninth clause or condition it is provided that:

"In case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, *at the written request of either party*, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy."

The eleventh clause or condition contains the following:

"It is furthermore hereby provided and mutually agreed, that no suit or action against the company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim *in the manner above provided.*"

It is undoubtedly competent for the parties to a contract to agree that damages claimed by either party under it shall be ascertained by an arbitration, and that no suit shall be brought until after such an arbitration has been had; but a contract which is intended to deprive the parties to it of the right of an appeal to the courts for redress, or to place conditions and limitations upon that right, should be strictly construed. And this is especially true of contracts which, like the one before us, embody numerous special provisions and conditions prepared and printed by one of the parties. By a liberal construction of the above quoted provisions of

the policy, it might be held that the assured was bound, as a condition precedent to the right to sue for his loss, to request the insurer in writing to enter into an arbitration; but it cannot be said that, strictly construed, the language must necessarily have this meaning. The first provision above quoted is, that in case of differences touching any loss, they shall, *at the written request of either party*, be submitted to impartial arbitrators. It is not alleged or claimed that there was a written request by either party for such arbitration. There is force in the suggestion that the language of the contract did not impose the duty of requesting an arbitration upon one party more than upon the other. The language employed might well have induced the belief on the part of the plaintiff that the duty of requesting an arbitration rested upon the defendant if it desired to enforce the provision, or to set it up as a bar to this action. The condition did not absolutely require an arbitration; it only authorized either party to require it by a request in writing. The inference is reasonable that if neither party requested it, in writing, the usual remedies by suit were to remain. It may reasonably be inferred that the parties had in view the possibility that in some cases both would prefer a suit in a court of justice to an arbitration, and therefore left it optional with either party to request in writing an arbitration, intending that, if both declined to make such request, legal proceedings might be resorted to. If this was not the intention of the parties, it is difficult to understand what purpose they had in view in using the words, "at the written request of either party." If it was their purpose to require that, in every case, the damages should be ascertained by arbitration, they could have said so in plain terms.

The second condition above quoted must be construed in connection with the first, and so that the two may harmonize. The latter provision declares in substance that no suit to recover any loss "shall be sustainable until after an award

shall have been obtained fixing the amount of such claim *in the manner above provided.*" If this provision stood alone, it might well be claimed that, in the absence of an arbitration and award, no suit could be maintained; but it refers to the prior condition respecting arbitration, and the two must be read together. So read, there is ground for holding that the two provisions together authorize either party to demand an arbitration, but do not absolutely require either to do so; and that where either does demand such arbitration, no suit can be maintained until after the amount of damages shall have been in that manner ascertained. We say there is ground for this construction, and we use this language because nothing more is required. If the language employed in the policy leaves the question in doubt, the construction placed upon it and acted upon by the assured is to be upheld. A contract drawn by one party, who makes his own terms and imposes his own conditions, will not be tolerated as a snare to the unwary; and if the words employed, of themselves or in connection with other language used in the instrument, or in reference to the subject matter to which they relate, are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed in favor of the assured.

As the insurance company prepares the contract and embodies in it such conditions as it deems proper, it is in duty bound to use language so plain and clear that the insured cannot mistake or be misled as to the burdens and duties thereby imposed upon him. Wood on Fire Insurance, 140, 141, and cases cited.

If it be held that the conditions above quoted are repugnant or inconsistent, the result is the same; for in that case the provision which is most favorable to the assured will be given effect. Id. p. 147.

The other questions discussed by counsel need not be considered, for the reason that such of them as are of impor-

tance or in anywise doubtful are disposed of by the special findings of the jury in answer to interrogatories submitted by the counsel for defendant.

Motion for new trial overruled.

LOVE, *District Judge*, concurs.

CASEY *v.* VASSOR *et al.*

(District of Nebraska. July, 1882.)

1. PUBLIC LAND — JURISDICTION OF LAND OFFICERS OF THE UNITED STATES. — The courts will not, by reason of their jurisdiction of the parties to a cause, determine their respective rights to enter or purchase from the United States a tract of the public land, when the controversy between them remains pending before the land department of the government, nor will they pass a decree that will render void a patent when issued.
2. SAME — SAME — OFFICERS OF THE GOVERNMENT. — The courts will not interfere with the officers of the government while engaged in the discharge of their duties in disposing of the public lands.

Equity. On demurrer to bill.

The complainant in her bill alleges that she is a *bona fide* settler upon eighty acres of the public land situated within the Sac and Fox reservation in Richardson county, Nebraska; that she became an actual settler and occupant upon said land with the intent of purchasing from the United States, and becoming the owner thereof, under an act of congress authorizing its sale, approved August 15, 1876 (19 Stat. 208). That said land was duly appraised as required by said statute at five dollars per acre; that complainant, on the twenty-first day of June, 1878, made the requisite proof before the register and receiver of the land office at Beatrice, Nebraska, and that she then paid to the receiver of said land office the sum of $133.34, being the first payment of one-third of the purchase price, and thereupon she was allowed to enter said land,

and received from said officer a certificate showing the said facts. The bill proceeds to aver the making of improvements and other facts tending to show that complainant was "an actual settler" within the meaning of the statutes. It is further averred that on the twenty-sixth of August, 1879, the defendant Vassor served complainant with notice that he would contest her right to enter said land, and that afterwards a trial was had before the register and receiver, who decided in complainant's favor, and held that she was an actual settler, and that thereupon said Vassor appealed from said ruling to the commissioner of the general land office at Washington, by whom the decision below was reversed, and it was declared that Vassor had the right to enter the land.

It is alleged that Vassor was not an actual settler and had no right to enter the land, and that the decision of the commissioner of the general land office was incorrect and not sustained by law; that complainant has fully complied with the law and the respondent Vassor has not. That since the commencement of this suit respondents have paid one or more instalments upon the land, and now unjustly claim that one or both have the exclusive right to purchase, and that they have expelled complainant from the land, and that defendant Vassor has executed a deed conveying said land to defendant Quinlan, who is charged with notice of complainant's rights.

It is not alleged that a patent has been issued to either claimant. The prayer is for decree that complainant has the first, sole and exclusive right, as against defendants, to enter and become the purchaser of said land, and that whatever right the respondents may have, is subordinate and subject to her rights, and held by them simply as trustees for her, and that they be ordered to convey, etc.

C. Gillespie and *E. W. Thomas*, for complainant.

Manderson & Congdon, for respondents.

McCRARY, *Circuit Judge.*—This case falls clearly within the principle announced by the supreme court of the United States in *Marquez* v. *Frisbie*, 101 U. S. 473. It is there held, in a case very analogous to the one before us, that a court will not, by reason of its jurisdiction of the parties, determine their respective rights to a tract of land which are the subject matter of a pending controversy in the land department, nor will it pass a decree which will render void a patent when it shall be issued. Relief in that case was refused because it appeared, "first, that defendants had not the legal title; second, that it was in the United States; and third, that the matter was still *in fieri* and under the control of the land officers." For the same reason we must refuse relief in the present case. The effect of a decree, if one were rendered in accordance with the prayer of the bill, would be to interfere with the officers of the government while in the discharge of their duties in disposing of the public lands, and this the courts will not do. *Litchfield* v. *Register, etc.* 9 Wall. 552; *Gaines* v. *Thompson*, 7 Wall. 347; *The Secretary* v. *McGarahan*, 9 Wall. 298; *Marquez* v. *Frisbie, supra.*

It is unnecessary to determine the question whether the decision of the land department, that complainant was not an actual settler, is the decision of a question of fact, and, in the absence of fraud, final and conclusive.

The demurrer to the bill is sustained.

MAISH *v.* BIRD *et al.*

(District of Iowa, Central Division. August, 1882.)

1. REMOVAL — FORECLOSURE — CROSS-BILL. — In a suit to foreclose a mortgage in a state court, the mortgagor and mortgagee being citizens of the same state, a non-resident who is made defendant on the ground that he has or clams an interest in the mortgaged property cannot, by filing a cross-bill alleging that the mortgage is fraudulent and void, so change the character of the suit as to make it removable under the act of congress of March, 1875.

2. SAME — SEPARATE CONTROVERSY. — Such an issue presented by cross-bill is incidental and subordinate, and not a separate controversy distinct from the main case, and which can be determined by itself.
3. JURISDICTION — CREDITOR'S BILL — LEVY. — In the federal courts a bill will not lie by a general creditor, who has no lien by levy or otherwise upon mortgaged property, to set aside the mortgage on the ground of fraud.
4. LIEN — GARNISHMENT. — It is well settled that no lien upon specific property is secured by the service of the process of garnishment upon the party in possession thereof.

On motion to remand.

McCRARY, *Circuit Judge.* — Maish, the holder and owner of a mortgage executed by Bird, brought his suit in a state court to foreclose the same, making Morrison, Harriman & Co. defendants, on the ground that they claimed an interest in the mortgaged property. Maish and Bird are citizens of Iowa, and Morrison, Harriman & Co. citizens of New York. The latter appeared and filed a cross-bill alleging that the mortgage sued on is fraudulent and void, and praying a decree to set it aside; and thereupon they petitioned the state court for a removal of the cause to this court, on the ground that, under their cross-bill, there is a controversy wholly between citizens of different states, and which can be fully determined as between them. The original suit was not removable. It was a proceeding, as to the main controversy, by one citizen of Iowa against another. There is nothing in the cross-bill that would have been improper in an answer except the prayer for affirmative relief. I am of the opinion that the non-resident defendants could not, by filing a cross-bill of this character, so change the nature of the suit as to make it removable, and thus compel Maish and Bird to bring their controversy here. If this is within the power of any non-resident who happens to be made a defendant in foreclosure proceedings in the state courts, the consequences must be very serious. A cross-bill is a defense. It cannot be employed for the purpose of introducing into the suit any

distinct matter. It is only auxiliary to the original suit and a graft and dependency on it. The original and cross-bill together constitute but one suit. We cannot look alone to the cross-bill to determine whether the suit is removable. 3 Daniel's Ch. Pr. 1851; *Ayres* v. *Chicago*, 101 U. S. 184; *Donohoe* v. *Mareposa Co.* 5 Sawy. 163.

It is not necessary to determine whether, in any case, a defendant in a chancery suit in a state court can, by allegations in a cross-bill, present issues upon which he can remove the cause to a federal court, when the parties to the main controversy, the obligor and obligee in the contract sued on, are citizens of the same state. It is only necessary, in this case, to hold that where the facts alleged in the cross-bill are purely defensive in their nature, and such as may properly be alleged by way of answer, no right of removal can be acquired by presenting them in the form of a cross-bill.

A careful consideration of the record also satisfies me that there is no separate controversy upon the cross-bill which can be wholly determined without reference to the issues joined upon the original bill. Should Morrison, Harriman & Co. sustain by proof the allegations of the cross-bill, they would do no more than establish a good defense to the complainant's suit, and decree for all the defendants would follow. If the allegations of the cross-bill should not be sustained by proof, then the trial would become a controversy solely between mortgagor and mortgagee, both citizens of Iowa.

Thus it is seen that the issue presented by the cross-bill is incidental and subordinate, and not a separate controversy, distinct from the main case, which can be considered and determined by itself.

There is another serious difficulty in the way of our retaining jurisdiction of this case. Conceding that the cross-bill is all that counsel for defendants claim for it, that is to say, that it is a separate suit or controversy in which Morrison, Harriman & Co. claim affirmative relief outside of and independently of the issues joined upon the original bill,

does it not follow that it is in substance and effect a creditor's bill, brought to set aside an alleged fraudulent conveyance by the debtor? It alleges that Bird is indebted to Morrison, Harriman & Co.; that they have commenced proceedings by attachment and garnishment to enforce their claim against certain property, and that Bird has made a fraudulent mortgage conveying said property to complainant Maish. A lien upon the property is claimed — not by virtue of a levy of the attachment thereon, but by reason of the service of the process of garnishment upon complainant and upon the Iowa National Bank, alleged to be in possession of the mortgaged property. Are these allegations sufficient to give a federal court of equity jurisdiction, and to entitle the plaintiffs in the cross-bill to relief? It would seem not. *Jones* v. *Green et al.* 1 Wall. 330.

It is more than doubtful whether such a bill can be maintained upon the ground that the complainant has issued an attachment and caused it to be levied upon the property; because if such be the case, it would seem that his remedy would be by proceeding to judgment in the attachment cause, and by selling or offering to sell the attached property upon special execution. But however this may be, it appears from the allegations of the cross-bill in this case that no levy upon the property has been made. It is clear that no lien was obtained by the garnishment of the parties in possession. *Moor* v. *Walker*, 46 Iowa, 167; *White* v. *Griffin*, 56 Iowa, 651; *Lindauer* v. *Kahn*, 53 Iowa, 452.

I do not inquire what the practice in the state courts may be, for in equity causes, whether originally brought in the federal courts or removed from the state courts, the former are bound to observe the general principles of the equity practice and jurisprudence.

It follows that the motion to remand must be sustained, and it is so ordered.

Wright, Cummins & Wright, for plaintiff.

Nourse & Kauffman and *Brown & Dudley*, for defendants.

MESSCHAERT *v.* KENNEDY *et al.*
SAHLGAARD *v.* SAME.
STRICKER *v.* SAME.

(District of Minnesota. June, 1882.)

1. EQUITY — PARTIES — WHO MUST JOIN AS COMPLAINANTS. — One of several joint owners of a number of bonds cannot maintain a suit in equity to declare such bonds a lien upon property without making the other joint owners parties.
2. DECREE OF ANOTHER COURT — WHEN AND HOW IMPEACHED. — Courts should judiciously refrain from interfering with the decrees of other courts, except when such interference or impeachment is plainly necessary.
3. FORECLOSURE — SALE OF RAILROAD — FRAUD. — The allegations of fraud in a decree of foreclosure, and in the sale thereunder of a railroad, and the proofs thereon considered, and the transactions held not fraudulent.

Bill in equity brought by the holders of certain bonds, secured by mortgage upon the St. Paul & Pacific Railroad, to set aside a decree foreclosing said mortgage, and the sale of the road thereunder, on the ground of fraud. After the decree and sale, and after the confirmation of the sale, these complainants applied for leave to be made parties to the foreclosure proceeding, which application was overruled. See 1 McCrary, 466. The present case is an original bill filed to impeach the decree and sale as fraudulent.

John M. Gilman and *C. K. Davis*, for complainants.

Geo. B. Young and *R. B. Galusha*, for respondents.

TREAT, *District Judge* (NELSON, J., *concurring*). — These three cases have been heard at the same time by agreement of counsel, because a large portion of the evidence is common to each. Many of the questions involved have been before this court in some form or another, especially in the Wetmore case (5 Dillon), so that, practically, little remains for present decision except the force of the evidence submitted

on the issues joined. It is not purposed to go into a statement of the cases at length; nor to analyze the evidence, review the authorities cited, or state specifically what has been authoritatively decided heretofore in the progress of this litigation. The record and all matters pertaining to the progress and ultimate decision of these cases will unquestionably undergo review by the supreme court of the United States, so that if any errors are now or have been heretofore committed, the losing party will have ample redress. As to the Sahlgaard case, there are two questions not involved in the other suits. The evidence discloses that he is not the sole owner of the bonds on which his suit is based, and that if his co-owners had been made co-plaintiffs, as they should have been, this court would have had no jurisdiction. It is urged that as the bonds are payable to bearer, and he happens to have the manual possession, therefore he has a right in equity to institute and pursue this litigation without disclosing that he is only one of many joint owners, and despite his own testimony that others than himself are such joint owners.

It must be borne in mind that this is a suit in equity in which the real parties in interest must appear, especially as they are seeking to invalidate judicial decrees in another forum, and to go behind those decrees to the extent, at least, of charging a trust upon the defendant railroad to the extent of bonds held by plaintiff, as if by a lien therefor. While it may be that the holder of negotiable securities can at law maintain a suit in his own name, excluding equities under given circumstances, yet when joint parties seek to upset judicial degrees, charge trusts and fasten supposed liens in consequence of joint interests, all of them should be before the court, in order that it may be known to what extent, and in whose favor, a decree may be had. If the bonds in question are to be decreed a lien on the property of the defendant, it must be done for the benefit of the owners of the bonds — for those who have an equitable right thereto, and

who are to be bound by the result of the litigation. If a decree should be given against this plaintiff, and he immediately thereafter shifts the manual possession to one of his coowners, can the latter institute a new suit and avoid a plea of *res adjudicata?* The rule is deemed clear and explicit that this plaintiff cannot maintain a suit of this nature in his own name, he being only one of several joint owners of the bonds in question, those holding a majority interest being citizens of this state. On that ground alone, if there were no others, his suit would have to be dismissed.

There is a second question, upon which it is not deemed necessary to give a definite opinion, viz.: whether his appearance in the state court, under the circumstances in evidence, does not conclude him. He appeared there, requesting to be admitted a party on the ground that the trustees of the bondholders were not faithful to their trust. Having sought the interposition of that court, and that court having passed on his demand adversely, and he having chosen to abide thereby, to what extent can he reopen that judgment, except possibly for actual fraud since discovered? If, in a direct proceeding to invalidate the decree of the state court, he can show that it was obtained by actual fraud, he has a right to be heard; but it might be that if full opportunity had been had to pursue his supposed rights before that court for whose aid he had applied, with a full knowledge of all the facts now presented, he would be held estopped. It is not necessary, however, to decide that point. It must suffice to refer to the many cases in which it is intimated that courts should judiciously refrain from interfering with the decrees of other courts except when such interference or impeachment is plainly necessary. There is a common ground of complaint in all of these cases, on which, independent of technical considerations, they would necessarily rest. It is charged that the decrees and decretal orders in the state court were fraudulent. This court has read with scrupulous care all the evidence before it, in the light of the undisputed

rule that fraud must be proved and cannot be presumed — that is, actual fraud. There were many suspicious circumstances which called for explanation, and which, as Justice Miller says, are not to be viewed in the light of after events for a correct interpretation. All the facts and circumstances must be considered as they existed with respect to the property involved at the time action was had with regard thereto. It is not uncommon that men embark in enterprises which promise great gain, and are ruined thereby; and, on the other hand, men invest in doubtful enterprises, and win eminent success. The latter seems to have been the case in hand. The foreclosure suits had been long pending; all parties concerned knew that without relief from some unknown quarter decrees and sales would inevitably follow. The bondholders, represented by their trustees, were urging such decrees and sales. In the meantime the depreciated bonds were on the market subject to the outcome of pending litigation. The majority resolved on the course deemed best for the interests of all, and urged all to join them. The known end was reached, ample opportunity for rescue having been given to the minority bondholders to appear, if they chose to incur the needed responsibility for averting the catastrophe. They did not choose to move in the matter although invited to do so. Where, then, is the actual fraud? None appears — mere inadequacy of consideration at a judicial sale does not establish a fraud. But it is further urged that a constructive fraud exists, and on the solution of that question, if none other applies, these suits must hinge. Every authority cited and many others have been carefully examined in order to reach a right conclusion. Most of the cases have turned upon the action of a trustee in buying for himself the property of his beneficiary, or speculating upon his trust, in some way, for his own benefit, to the detriment of those whose interests were intrusted to him for their protection. He cannot be agent of both buyer and seller, and favor one to the injury of the other, his double relationship being con-

cealed. It is not necessary to refer to cases of attorney and client, guardian and ward, etc. Kennedy & Co. were the representatives of the Amsterdam committee in an agreement pronounced by Justice Miller to be perfectly legitimate. As such representatives they were bound to see that the syndicate complied with the contract made. They held the securities in their hands for the enforcement of the contract. That could not be effected until after decretal sales and confirmations. Those decretal sales were to be for the benefit of all bondholders, and every bondholder and stranger was invited to purchase. Full publicity was given. When Mr. Kennedy became a trustee by appointment, what was his duty to the bondholders? Evidently to enforce their rights through foreclosure. All other means had failed. His duties as representative of the Amsterdam committee, instead of being repugnant to his duties as a trustee were in entire accord. If, however, he, in actual fraud of the rights of the minority bondholders, entered into a scheme with the so-called syndicate to sacrifice the property, so that the syndicate should acquire the same in a way to defraud the minority, then not a constructive but an actual fraud existed. As already stated, no actual fraud is shown and no constructive fraud appears. The result is decisive of all three of the cases. Yet it is not improper to remark that courts of equity scan with great distrust all champertous suits. It is clear that the Stricker and Messchaert suits are tainted with champerty. It does not appear that they were the owners of any bonds until after the decretal sales and confirmations. Hence the strong dicta of the United States supreme court in recent cases are applicable. If the bonds were bought after such judicial action, they had no value except as judicially established. Their purchasers did not acquire an assignment of a supposed right of action to impeach such judicial proceedings. It would be inconsistent, as suggested by the United States supreme court, with all rules of equity concerning property interests of the nature involved, if, after

judicial sales, any one not at the time interested in the controversy could, by the purchase of one or more bonds, be permitted to assail such decrees. There may be thousands of such bonds outstanding, and one or more speculators in law suits could, if a different rule obtained, stir up litigation indefinitely. If he bought bonds after the judicial decrees, he bought subject thereto. As to the sale in gross, the courts have decided that such is the legal and proper mode in this class of cases. This court has not failed to notice the difference between the decrees entered in the state court and those usually entered in like cases as in this court under the $15,000,000 mortgage. Hence the evidence was closely scrutinized in that regard. Why a clause was not inserted in the decrees permitting the minority bondholders to come in, after purchase within a limited time, on equal terms with purchasing bondholders, is not disclosed. There may have been adequate reasons to the contrary, and it is not for this court to revise those decrees in that respect or as to any other of their details.

The result is that each of these three cases must be dismissed with costs, and a decree will be entered accordingly.

FARLEY *v.* ST. PAUL, MINNEAPOLIS & MANITOBA R'Y CO. *et al.*

(District of Minnesota. June, 1882.)

1. FRAUD — TRUST — EQUITY — WHEN RELIEF WILL BE DENIED.— It is a controlling maxim that a court of equity will not aid parties in the perpetration or consummation of a fraud; nor give any assistance whereby either of the parties connected with a betrayal of a trust can derive any advantage therefrom.
2. SAME — SAME — RECEIVER — PURCHASE BY, OF CLAIMS AGAINST THE PROPERTY IN HIS HANDS.— Where several parties, one of whom was the receiver of a railroad against which foreclosure proceedings were pending, entered into a scheme to purchase outstanding bonds secured by the mortgage being foreclosed, with a view to using the same in buying in the railroad under the expected foreclosure sale; and the receiver was to, and did, give to the other parties information known only to him respecting such bonds, and did aid and assist in

the negotiations leading to the purchase of the same; and where the fact that the receiver was interested, and of his connection with such purchases, was suppressed, and the purchases were made in the name of the other parties, who afterwards bid in the railroad at the foreclosure sale, in their own name, and refused to account to the receiver, *held*, the case was not one which can be upheld, without a violation of the most positive and clearly defined rules governing such cases.

3. SAME — DISTINCTION BETWEEN ACTS MALA PROHIBITA AND MALA IN SE.— It may be that there is discernible in adjudged cases a distinction between acts *mala prohibita* and *mala in se*, through which funds or property have came into the hands of one confederate for the benefit of all — acts which have no intrinsic turpitude further than is implied in the violation of a mere statutory provision. *Brooks* v. *Martin*, 2 Wall. 70, considered.

4. VIOLATION OF OFFICIAL DUTY OR OF A TRUST GROWING OUT OF A FIDUCIARY RELATION.— The rigid enforcement of those rules which forbid one charged with an official duty of a fiduciary nature from betraying his trust for private gain, is essential to the administration of justice; and it is therefore held that such conduct, among other penalties, subjects him to whatever loss may fall upon him through the dishonesty of his confederates.

Bill in equity. Complainant Jesse P. Farley was the receiver of the St. Paul & Pacific Railroad Company, and while holding that office and engaged in operating the road, he entered into a contract with defendants Kittson & Hill, whereby the three were to acquire by purchase or contract, for their joint interest, outstanding bonds against that company, for the purpose of using the same in the purchase of the railroad property at an expected foreclosure sale under a decree to be thereafter rendered in the foreclosure proceedings then pending, in which complainant had been appointed receiver. Complainant furnished no money with which to purchase said bonds, but gave information known only to him, and aided and assisted the other parties in their negotiations. Complainant was not known in the transaction except to Kittson & Hill, and the latter purchased in their own names. Afterwards the railroad was sold under foreclosure and bought in by Kittson & Hill and Smith & Stevens (the latter having acquired an interest with the consent of

the former and of complainant), and the defendant, the Minneapolis & Manitoba Railroad Company, was organized by said purchasers, and in the corporate name acquired the title. Defendants, after their purchase, refused to recognize the claims of complainant, who thereupon brought this bill to recover his share of the profits of the transaction, for an accounting, etc.

Respondents filed a plea in bar in setting up the foregoing facts, and alleging that complainant is entitled to no relief.

Griffith & Knight, Gillman & Clough and *C. K. Davis*, for complainant.

E. B. Galusha, Geo. B. Young and *Bigelow, Flandreau & Squires*, for respondents.

TREAT, *District Judge* (NELSON, *District Judge, concurring*).—This case is before the court on a joint plea and the evidence pertaining thereto.

Counsel on either side have given the largest aid to the court by oral arguments, elaborate briefs and full citations of authorities; and therefore, however interesting an exhaustive review might be, if time permitted, the task is unnecessary. It must suffice to state that the supposed conflict of authority, when the cases are analyzed, disappears; so far at least as the rules of equity decisive of the questions now to be determined are involved. It is a controlling maxim that a court of equity will not aid parties in the perpetration or consummation of a fraud; nor give any assistance whereby either of the parties connected with a betrayal of a trust can derive any advantage therefrom.

It is contended that this case does not fall within the general rule, because the fraudulent scheme ended with the purchase of the bonds, and the aid of the court is not invoked to enforce the same. It is clearly shown, however, that such purchase was merely the initiatory step toward effecting the main design. The theory of the bill, the plaintiff's own tes-

timony, and all the facts and circumstances proved, demonstrate that the scheme was to acquire the large railroad properties through the acquisition and use of the depreciated bonds. The plaintiff urges that he devised the plan, and that without the assistance he alone could give, the plan would necessarily fail. He goes even further in disclosing that it was only through concealment of his connection with the operations could success be realized. He held an eminently fiduciary relation to all interested in the property committed to his management; and it was through information thus acquired and concealed from the beneficiaries, also from the state and United States courts, that the contemplated fraud could be effected. It may be conceded that in private trusts, where constructive frauds have been consummated and the wronged parties do not complain, courts have refused to listen to the volunteers, or, as between parties litigant, examine into the means whereby the one or the other has become charged with a new trust toward his associates. This rule rests largely on the reason that the court is called upon, not to ascertain the sources whence the fraud was derived, in the absence of beneficiaries complaining, but merely to decide whether a new trust was created which has been or is about to be violated. It may be that there is discernible in adjudged cases a distinction between acts *mala prohibita* and *mala in se*, through which funds or property have come into the hands of one confederate for the benefit of all — acts which have no intrinsic turpitude further than is implied in the violation of a mere statutory prohibition. The strongest case cited for plaintiff, *Brooks* v. *Martin*, 2 Wall., contains that element, and seems to be shaded with the thought that the parties sought to be protected by the statute not only failed to complain, but most of them ratified expressly all that had been done. That case was peculiar in many of its features, and, like the English cases cited in the opinion, is clearly distinguishable from the transaction now under review. In those cases there was no act of moral turpitude,

like the betrayal of trust for selfish greed, which called for investigation; but merely the relationship of the litigant parties, independent of prior dealings between them and others. In *Brooks* v. *Martin* the court examined into the assignment obtained by Brooks from his partner, Martin, through actual fraud, and ruled that he could not shield himself from the consequences of that fraud, by showing a prior violation of a prohibited act in which they were participants, even if such a violation, consummated, furnished the trust fund assigned. To hold otherwise would have permitted a person to escape the consequences of one fraud by setting up another and distinct fraud in which the litigants had previously participated.

To escape the result of a fraudulent assignment, Brooks urged on the court, as a defense, that said fraudulent assignment was connected with a joint fraud theretofore committed. Such a defense the court refused to consider.

There is another class of cases — the most pointed of all — the rigid enforcement of whose rules is essential to the pure administration of justice. Those rules not only forbid one charged with an official duty of a fiduciary nature from betraying his trust for private gain or any purpose whatever, but among other penalties subject him to whatever loss may fall upon him through the dishonesty of his confederates. That salutary end is effected by a resolute refusal to give him any aid toward the enforcement, against his confederates, of their fraudulent scheme. Courts will not and ought not to be made the agencies whereby frauds are to be in any respect recognized or aided. They will not unravel a tangled net of fraud for the benefit of any one enmeshed therein through whose agency the web was woven. Especially must that be the rule where a trusted officer of a court, whose position is both advisory and fiduciary, seeks its assistance to compel confederates to share with him the spoils acquired through his concealments and deceits, which he admits were deemed by his confederates and himself necessary to their

success, through his betrayal of his trusts. The plaintiff conceived a scheme to wreck the vast interests which it was his duty to protect. He had acquired, in his fiduciary capacity, information through which the desired end could be reached. It was necessary for him to have confederates, that he should impart to them his secret information; that he should continue through the progress of the scheme to advise with, and inform them of what, from time to time, became known to him; that his connection with them should be concealed from the courts, to whose orders he was subject, and which had a right to rely upon his fidelity. Through a betrayal of his trust under such circumstances, according to his version of the facts, these vast railroad properties have been secured, and a profit realized of possibly $15,000,000 or more. His pretense now is, that through such betrayals of official and *quasi*-judicial trusts, his confederates have amassed properties, moneys and values to a vast amount, with an understanding from the beginning that they were to reward him for his betrayals by sharing with him one-sixth or some other portion of the spoils. They deny his averments, and he charges that they repudiate the fraudulent contract they made with him. As they do not divide the spoils, this suit is brought to compel them and the railroad defendant, as if by specific performance, to issue to him his proportionate share of its capital stock, and also grant him proportionate parts of profits and gains, and also interests in undivided property yet remaining. This is a sad picture, and a strange demand to present to a court of equity. To what extent the alleged confederates are blameworthy or culpable, if at all, could be made to appear only after answer and full proofs. The court, however, must dispose of the case as now presented. A few days ago a demurrer interposed was overruled, on the ground, substantially, that the theory of the bill was to require of the court the enforcement against the railroad defendant, not only of a division of the alleged corrupt spoils, a part of which had passed to the possession

of the co-defendants, but of the remaining assets, undivided; also a partition of property, etc., as just stated. Thus the powers of a court of equity were invoked to enforce the execution of a fraud on itself as a court as well as upon others. Surely no principle of equity, morals or law can countenance such a demand; and no court worthy of its trust would lend its aid to further a scheme so abhorrent to all recognized rules of right and justice.

It is charged, however, and for the purposes of this case may be admitted, that Mr. Kennedy, agent of the Amsterdam committee, was advised by plaintiff during the progress of the scheme that he, the plaintiff, was secretly betraying his trust. If so, the gravity of plaintiff's offense was not lessened by thus adding a new confederate to his fraudulent plans, especially one whose relations were eminently fiduciary toward his principal, the Amsterdam committee, the court and others interested. Plaintiff's cause of action is based upon inherent turpitude, and hence the fundamental maxim applies, "*Ex turpi causa*," etc.; therefore another maxim has potential force, viz.: "*Potior est conditio defendentis.*" In plain English, courts of equity will not recognize as valid or enforce any agreement grounded in turpitude; nor will they undertake to unravel a tangled web of fraud for the purpose of enabling one of the fraudulent parties, after such judicial disentanglement, to consummate his fraudulent designs. The party complaining must come before the court with clean hands. In this case he has not, by the averments of his bill, nor by his sworn testimony, either clean hands, within the rules of equity, nor any cause of action which can be upheld, without a flagrant violation of the most positive and clearly defined rules governing such cases.

The plea is sustained, and the bill dismissed with costs.

MERCHANTS' INTERNATIONAL STEAMBOAT LINE *v.* LYON.

(District of Minnesota. May, 1882.)

1. PLEADING — FORMER JUDGMENT AS AN ESTOPPEL.— Where a judgment of record in a former suit is pleaded as an estoppel, which does not on its face show that the verdict was rendered upon the same issues as those in the suit on which it is pleaded, evidence *aliunde* is required to prove that the precise point involved was submitted to the jury.
2. SAME — FORMER JUDGMENT AS A BAR — PROOF ALIUNDE.— Where the answer of the defendant sets up the same defense as the answer in the former suit, admissions by counsel, in connection with the offer of the record as evidence, that testimony upon both defenses of the former action was admitted and went to the jury, relieves the uncertainty in the record, and shows that the question raised by the pleadings in the present suit was litigated and determined in the former suit.

This suit is brought upon three promissory notes, aggregating the sum of $2,300. The defendant is the maker, and they were made payable to the order of A. G. B. Bannatyne, and by him indorsed and delivered to the plaintiff. Before the commencement of this suit the State National Bank of Minneapolis brought an action upon these promissory notes, claiming to be holder and owner thereof, which was tried in this court, and a verdict rendered for defendant and judgment entered. The judgment record is pleaded in the defendant's answer as a bar to a recovery by the plaintiff. The answer in the former case of *Bank* v. *Lyon* sets up two defenses, one of which was that the notes were given without consideration, and testimony was offered and submitted to the jury tending to support both defenses, and a general verdict was found for the defendant. The answer of the defendant in the present action sets up the same defenses presented by the answer in the former suit, including the one alleging that the notes were given without consideration; and for a further defense sets up the verdict and judgment obtained in the former suit as a bar to a recovery by this plaintiff. After the plaintiff had offered on the trial

the notes in evidence, it rested, whereupon the plaintiff admitted that testimony was offered and submitted to the jury in the former suit tending to support both defenses set up in the answer, and the defendant offered in evidence the judgment record in that suit, which was admitted under the objection of the plaintiff. The defendant offered no further evidence, but asked the court to charge the jury that the former suit and judgment, and the record thereof, was a bar to the present suit, and that the defendant was entitled to a verdict in his favor. The court charged the jury that as the case stood, the said former suit was a bar to a recovery by the plaintiff in this action, and that the jury must find a verdict for the defendant, and under the charge and instructions the jury so found a verdict. Motion is made for a new trial.

Bigelow, Flandreau & Squires, for plaintiff.

C. K. Davis and *R. B. Galusha*, for defendant.

NELSON, *District Judge.*— The plaintiff asserts that the court erred in laying down the proposition that where two defenses are set up in an answer, and evidence is submitted to a jury upon a trial of the action tending to support both defenses, and a general verdict rendered for defendant, such verdict and judgment is a bar in another action upon the same demand.

The plaintiff's counsel has cited many cases in his brief to sustain the proposition that the general verdict, and judgment which followed, was not a bar; but an examination of them shows that in nearly all the judgment alone, without explanatory evidence, or any admission as to what the facts litigated were, was offered and claimed to be of itself an estoppel.

If the offer of the record in evidence in the former action had not been accompanied by the admission that testimony was submitted to sustain both defenses, or evidence *aliunde* given tending to prove that fact, these authorities might be

applicable. In this case the presumption is that the jury passed upon all the issues made in the former action, and that they considered the evidence introduced relative to both defenses, and the record is conclusive.

It is impossible to show *aliunde* that the verdict was found upon one and not both defenses, without inquiring into the secret deliberations of the jury, which is not admissible. It is only necessary for the defendant, who relies upon the record in a former action as a bar, to go into evidence *aliunde* to prove such a particular question was actually controverted and submitted to the jury, and that the verdict was such as to show that they passed upon it, when such fact does not appear upon the face of the record. This evidence was supplied by the admission of the plaintiff on the trial, and made the estoppel effectual.

The case of *Russell* v. *Place*, 94 U. S. 606, is cited by the plaintiff's counsel as settling in his favor the legal effect of the record in the former suit. I do not so understand the opinion. In that case a bill was filed to recover for the infringement of a patent. The complaint sets forth the invention and the issue of the patent, and a recovery of a judgment for damages against the defendants, in an action at law for a violation of the patentee's rights, and alleges the infringement of the patent by defendants, and asks for a decree. The answer sets up as a defense the want of novelty in the invention, and admits the recovery by the complainant in the action at law of the judgment set up, but denies that the same issues were involved or tried in that action which are raised here. The action at law was in the usual form of such actions for infringement of secured privileges. The defendants pleaded the general issue, and set up by special notice, under the act of congress, the want of novelty in the invention. The plaintiff obtained a verdict for damages, upon which the judgment mentioned in the bill filed was entered, and which it is claimed estops the defendants from insisting upon the want of novelty in the

invention. No extrinsic evidence was offered to show that testimony was submitted to the jury upon the question of the novelty of the invention in the action at law, but the record alone was relied upon, which did not show it, as a bar to the defense of want of novelty.

The court announced the rule which had on many previous occasions been followed, to wit: That a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but to give this effect to the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit.

Applying the rule thus announced, it appears that the judgment record in the former action, pleaded as an estoppel in this suit, did not, upon its face, show that the verdict was rendered upon the same issue now tendered; and to make the record operate as an estoppel, evidence *aliunde* was necessary to prove that the precise point involved was submitted to the jury. The admission by counsel, in connection with the offer of the record as evidence, that testimony upon both defenses was admitted and went to the jury, relieves the uncertainty in the record, and shows that the question raised by the pleadings in this suit was litigated and determined in the former action.

It is true, the plaintiff in this action was not a party to the former suit, but his privity with the plaintiff in the former action is not doubtful. Both plaintiffs claimed through Bannatyne, the payee and first indorser.

Motion for new trial denied.

McCRARY, *Circuit Judge*, concurs.

LUEDERS' EX'R *v.* HARTFORD LIFE AND ANNUITY INS. CO.

(Eastern District of Missouri. May, 1882.)

1. INSURANCE — APPLICANT MUST ACT IN GOOD FAITH. — A party applying for insurance is bound to answer questions concerning facts material to the risk, truthfully.
2. SAME — APPLICATION — RULE WHEN AGENT INSERTS FALSE STATEMENTS. — Where an authorized agent of an insurance company has examined an applicant for insurance upon questions contained in a blank application, and undertakes to fill in the applicant's answer, the applicant has a right to presume that his answers have been written down as given; and if he has answered all questions truly, and signs the application under the impression that his answers have been correctly reduced to writing, a policy issued on the faith of the application will not be invalidated by false answers inserted in the application by the company's agent without the applicant's knowledge, even where the application is made a part of the policy and contains a declaration that the answers contained therein "are full, complete, and true; and it is agreed that this declaration and warranty shall form the basis of the contract between the undersigned" and the company.
3. SAME — EVIDENCE. — In such cases oral evidence is admissible to prove that the questions contained in the application were answered truly by the applicant.
4. SAME — JUDGMENTS. — Where a mutual life insurance company issued five certificates of membership in its safety-fund department to an applicant for insurance, in each of which it agreed in case of the assured's death to make an assessment "upon the holders of certificates in force in said department at the date of such death according to the table of graduated assessment rates given herein, as determined by their respective ages and the number of such certificates in force at the date of such death, and the sum collected thereon (less ten cents per member for costs of collection) shall be paid; provided, however, that in no case shall the payment upon this certificate, in the event of such death, exceed $1,000, less $15 as a *post mortem* contribution to said safety fund:" *held*, that upon the assured's death his legal representative was entitled to judgment against said company for the maximum amount named in said certificate.

This was a suit by the executor of J. H. Lueders upon five certificates of insurance, in the sum of $1,000 each, issued by the Hartford Life & Annuity Insurance Company upon

the life of said Lueders. The petition declared the certificates as simple contracts of insurance, and asked judgment upon each certificate for the maximum amount named therein. The defendant answered that said certificates were null and void because of certain concealments on the assured's part, and because the answers contained in his application in reference to his health were false. And the answer set up a provision of the certificates sued on, by which it was provided that if there should be any concealment, misrepresentations, or false statements made in the application on which said certificates issued, said certificates should be null and void. Plaintiff in reply denied the allegations of the answer, and alleged that the assured had concealed nothing and made no false representation, but had, in reply to questions contained in the application, stated the truth to the defendant's agent who took his application; that the answers contained in said application had been written therein by defendant's agent; and that if false answers had been inserted, it was without the applicant's knowledge. The application upon which the certificates sued on were issued contained, among others, the following questions and answers:

"(12) Do you now possess a sound constitution and good health? Yes."

"(19) How long is it since you were attended by a physician, or have professionally consulted one? About six weeks ago. For what disease? Liver complaint. Have you fully recovered therefrom? Yes."

The following declaration was appended to the application:

"It is hereby declared and warranted that the foregoing answers and statements are full, complete, and true; and it is agreed that this declaration and warranty shall form the basis of the contract between the undersigned and the Hartford Life & Annuity Insurance Company, and are offered to said company as a consideration of the contract applied for, and are hereby made a part of the certificate to be issued on the application," etc.

The application was signed by the applicant.

The certificates sued on each contained the following clauses:

"In consideration of the representations, agreements and warranties made in the application herefor, and of the admission fee paid, and of the sum of $10 to be paid to said company, to create a safety fund as hereinafter described, and of twenty-five cents to be paid monthly for expenses, and of the further payment, in accordance with the conditions hereof, of all mortuary assessments, does hereby issue this certificate of membership in its safety-fund department to J. H. Lueders, of St. Louis, county of St. Louis, state of Missouri, with the following agreements:

"That said company will deposit said sum of $10, when received, with the trustee named in a contract made with it (of which a copy is printed herein), as a safety fund, in trust for the uses and purposes expressed in said contract, and shall, at the expiration of five years from July 1, 1879, if said safety fund shall then amount to $300,000, or whenever thereafter said sum shall be attained, make a semi-annual division of the net interest received therefrom by it, *pro rata*, among all the holders of certificates in force in said department at such times, who shall have contributed five years prior to the date of any such division their stipulated proportion of said fund, by applying the same to the payment of their future dues and assessments. . . .

"Said company further agrees that if at any time after said fund shall have amounted to $300,000, or after five years from January 1, 1880, if that amount shall not have been attained before that date, it shall fail by reason of insufficient membership, or shall neglect, if justly and legally due, to pay the maximum indemnity provided for by the terms of any certificate issued in said department, and such certificate shall be presented for payment to said trustees by the legal holder thereof, accompanied by satisfactory evidence as here-

inafter provided of its failure to pay, after demand upon it within the time herein stipulated for limitation of action, then it shall be the duty of said trustee to at once convert said safety fund into money, and divide the same (less the reasonable charges and expenses for the management and control of said fund) among all the holders of certificates then in force in said department, or their legal representatives, in the proportion which the amount of each of their certificates shall bear to the amount of the whole number of such certificates in force; and that in such event it shall file with said trustee a correct list under oath of the names, residences, and amounts of the certificates of all members entitled to participate in such division. . . .

"The evidence referred to above to be either certification of said insurance company's president or secretary that a claim is justly and legally due, and that payment thereof has been demanded and refused, or the duly attested copy of a final judgment obtained thereon in any court of competent jurisdiction, satisfaction of which has been neglected or refused for the period of sixty days from date. . . .

"Upon the death of the member aforesaid while this certificate is in force, all the conditions hereof having been conformed to by said member, and on the receipt by the president or secretary of said company of satisfactory proofs of such death, an assessment shall be made upon the holders of all certificates in force in said department at the date of such death, according to the table of graduated assessment rates given herein, as determined by their respective ages, and the number of such certificates in force at the date of such death, and the sum collected thereon (less ten cents per member for costs of collection), shall be paid; provided, however, that in no case shall the payment upon this certificate in the event of such death exceed $1,000 (less $15 as a *post mortem* contribution to said safety fund). . . .

"The application on the faith of which this certificate is-

sued is hereby referred to and made a part of this contract."

The case came up for trial April 11, 1882, and was tried before a jury.

The plaintiff introduced the certificates sued on in evidence. Defendant introduced the application, and evidence tending to prove that the assured had liver complaint at the time he made the application, and knew it. Plaintiff offered oral evidence in rebuttal tending to prove that the assured had told the examining physician of the defendant, when his application was taken, that he had liver complaint; that said physician had examined assured and had himself inserted the answers contained in the application; and that the assured had signed the application supposing it contained the answers given by him. Defendant objected that the only admissible evidence as to what answers had been given to the questions contained in the application was the application itself; but the objection was overruled.

George M. Stewart and *Paul Bakewell*, for plaintiff.

Frank K. Ryan, for defendant.

TREAT, *District Judge (charging jury orally).*— This case differs in some respects from the cases ordinarily submitted to juries concerning life insurance policies. If you should find for the plaintiff, as there are five of these so-called certificates or policies, you will necessarily find for her in the sum of $5,000, with interest at the rate of six per cent. per annum from December 15, 1881; that is, ninety days after the proof of death.

Now, shall the plaintiff recover? The primary contest is that the deceased made a false statement concerning a disease which he then had and which contributed to his death, to wit, the so-called liver complaint. The answer to the question, as recorded in the application, is: "Had liver complaint six weeks ago; am well now." If he had not

recovered from the liver complaint, and if he actually made that answer, and died of that disease within the short period named, the plaintiff here has no right to recover; in other words, your verdict should be for the defendant. But did he make such an answer? And there the strain of the case comes. You have heard the testimony of the widow, and of the doctor who examined Mr. Lueders. When questioned by the medical examiner of this company concerning this supposed liver complaint, if he did make the answers as stated by Mr. Wagner and by the doctor, and they were written down in pencil on this paper, and the paper was put across the table for him to sign, and he signed it under the hurry and circumstances developed before you, he had a right to suppose that his answers were recorded as he gave them. If that statement is correct, then this paper is a subterfuge, because he did not tell them what is written down there, but told them that he not only had liver complaint and enlargement of the liver, but that he believed he still had it, and told them who his doctor was that treated him for it; and if this medical examiner of the company wrote down merely his own conclusions with regard to it, and not the answers of the applicant, then the plaintiff is not bound by this application. In other words, every one is bound in these matters, whether the company be a mutual or any other sort of company, to deal truthfully and honestly with the company, because on the faith of the statement of the applicant the company must determine whether it will assume the risk; therefore if the applicant, with regard to any of the questions which are material to the risk, answers falsely, there can be no recovery on the policy. That principle, as a matter of common honesty, ought to obtain with regard to all transactions between man and man.

I presume it will hardly be questioned by you, in the light of the testimony, that the deceased died of the disease called *cirrhosis* of the liver, or, in ordinary language, liver com-

plaint. When he underwent examination and was called upon to answer questions, what did he answer? Did he answer that he had liver complaint formerly and was now well? Or did he answer that he had enlargement of the liver? Do you believe that he gave this answer and saw the medical examiner write it down, or is it the conclusion of the medical examiner not only from the statements made by the party applying for the insurance, but also from the result of his own medical investigation? If the answers are not written down as the applicant gave them, he is not responsible for what anybody else wrote. He had a right to suppose, in common honesty, that when he signed the paper, which was written in pencil, his answers were correctly recorded, more especially when an officer of the company was recording them. If the officer of the company wrote down, not the answers made by the applicant, but his conclusions gathered from the statements of the applicant and his reference to his medical attendant, Dr. Holland, and also from his own examination, and these are answers that the applicant never made, he is not bound by them.

So that, to sum it up in a few words, if the deceased made a false statement in regard to a matter which is material to the risk, to wit, concerning this liver complaint, from which he died, there can be no recovery by the plaintiff; but if, on the other hand, despite his signature to this paper (which seems originally to have been written in pencil, even supposing it was correctly transcribed into ink afterwards), these are not the answers the applicant made to the questions, but what the doctor chose to write down as his conclusions from the answers made to the questions and his examination, then the plaintiff is entitled to recover. In other words, the applicant is only bound by the answers he makes, and is not bound by the conclusions of the examining doctor from the statements of the applicant, or by the opinion of the doctor with regard to them. You understand me, gentlemen, in regard to it. You have heard the testimony of two witnesses

as to what occurred at the time the application was signed, the questions that were put, the circumstances under which they were put, how they were noted down, and who noted them down. They were not written in the handwriting of the deceased. They were written by the medical examiner of the company under the circumstances which he has disclosed. Now, these answers, in the light of the testimony of the widow of the deceased, would appear to be (and that is for you to decide) rather the result of an opinion formed by the medical examiner as to what ought to be the answers, and not what the answers really were. In other words, if, as the doctor testifies, the answer was, "I have had an enlargement of the liver," and went through the process of disrobing in order that the doctor might determine the matter, and the doctor, reaching his conclusions, chose to write down this answer without the knowledge of the deceased, it is not the answer of the deceased, and he is not responsible therefor.

The defendant excepted to the giving of the following portion of said charge, to wit:

"Now, shall the plaintiff recover? The primary contest is that the deceased made a false statement concerning a disease which he then had, and which contributed to his death, to wit, his so-called liver complaint. The answer to this question, as recorded in the application, is: 'Had liver complaint six weeks ago; am well now.' If he had not recovered from the liver complaint, and if he actually made that answer and died of that disease within the short period named, the plaintiff here has no right to recover. . . .

"So that, to sum it all up in a few words, if the deceased made a false statement in regard to a matter which is material to the risk, to wit, concerning the liver complaint from which he died, there can be no recovery by the plaintiff. . . .

"Therefore, if the applicant, with regard to any of the questions which are material to the risk, answered falsely, there can be no recovery on the policy."

Under the instructions of the court the jury found for the plaintiff.

The judgment, after reciting the verdict, etc., proceeds:

"It is therefore considered by the court that the plaintiff, Caroline Lueders, executrix under the will of J. H. Lueders, deceased, have and recover of the defendant, the Hartford Life & Annuity Insurance Company, of Hartford, Connecticut, as well the said sum of $5,096.66 (five thousand and ninety-six dollars and sixty-six cents), the damages as aforesaid by the jury assessed, as also the costs herein expended, and that execution issue therefor."

The defendant moved the court to set aside the verdict and judgment entered in the cause for the following reasons:

"(1) The verdict of the jury is against the evidence presented at the trial. (2) The verdict was against the weight of the evidence. (3) The verdict is against the law as declared in the charge by the court to the jury. (4) Because the court erred in refusing to charge the jury as asked for in the instructions offered by the defendant. (5) That the court erred by its charge to the jury in submitting to said jury the materiality of the alleged warranties and misrepresentations of J. H. Lueders contained in his application for insurance."

The following opinion was delivered upon the motion:

TREAT, *District Judge.*— Under the insurance statutes of Missouri the defendant established an agency in this state, subject, of course, to the provisions of said statutes. It is contended that the contract sued on does not permit recovery of any sum, when loss occurs, except to the extent of assessments to be made upon the number of issued certificates; consequently the plaintiff must aver and prove the number of such outstanding certificates, the judgment to be limited thereby, notwithstanding the amount insured. The case referred to in Connecticut reports (*Curtis* v. *Mutual Benefit Life Ins. Co.* 1880) goes very far in that direction; indeed, is directly in point.

It is not proposed to analyze the various cases in England and the United States which seemingly bear on like policies. The contract sued on is somewhat anomalous. It is presumed that it contemplated some available measure of indemnity. When a loss occurs under it, and satisfactory proofs thereof are made to the president and secretary, their duty to make the required assessment ensues, according to its express terms. If they fail to perform such duty shall the other party be remediless? As to what legal proceedings might then prevail it is not necessary now to discuss. This suit is to establish plaintiff's rights in a case where the company denies that he has any rights whatever. The contract contemplates on its face that final judgment may have to be made; and whether it did or not, the parties aggrieved would have their legal remedy in the proper courts.

It is necessary for the plaintiff to prove a valid loss, the amount to be recovered therefrom after judgment being dependent, possibly, on subsequent events, viz., how much may be collected on the required assessments. Shall the suit at law be based, as to damages, on the number of outstanding certificates, irrespective of what may be collected from assessments thereon within ninety days? Enough appears to show that more than twenty-two thousand certificates of the class named have been issued — scattered, it may be, over many states. It is best known to the company who and where are the certificate holders, and, if plaintiff's rights to a judgment on a disputed loss are to be limited by the number, etc., of outstanding certificates, it would seem that defendant should set up the limit as to the mumber, etc., lapsed or otherwise.

There are many strange provisions in the contract. It is made by a corporation which, it is contended, has subdivided itself into departments for the conduct of distinct branches of business, on some of which it is directly and positively liable, and on others only contingently liable, and on others liable, as in this case, only in such a way as to become a

mere agent to collect from its policy-holders what assessments they may be liable to for losses occurring. Possibly such may be the true construction of its differing contracts and of its corporate obligations; but this court is not prepared so to hold. There must be some one answerable at law for the contracts it makes, and judgments on such contracts must be against the corporation; but why, if merely an agent? In the absence of any proof to the contrary, the sum recoverable should be against the corporation for the maximum insured. Any other rule would make this insurance scheme a mere delusion and snare.

It may often happen that the corporation disputes all liability, and hence refuses to make any assessment, as in this case. When such a dispute is submitted to a court of law, and the judgment is against the corporation, who shall respond to that judgment? If the loss had been admitted originally, and assessment made on the certificate-holders, and the amount collected paid over within ninety days, as the contract contemplates, no great difficulty might have occurred. Surely the commencement of this suit did not so fix the obligation of other certificate-holders as if, by a lien, that they, and they alone, would be answerable, and only for the result of this judgment. The scheme, if it be as contended, is vague and indeterminate — *first*, as to the amount of loss recoverable; and *second*, in the event of litigation, against whom and to what extent judgment shall be enforced. If judgment is to be against the corporation, for what amount shall it be rendered, and how shall the amount be ascertained? If the assessment is to be made only on certificate-holders existing at the time of loss happening, how is it as to those who fail to pay? Who shall collect from the delinquents, and when? What becomes of a judgment for a certain amount? If the judgment has to be for an amount equal to the number of certificate-holders, how about payment within ninety days, when assessments are to be collected equally and solely from certificate-holders scattered all over the country?

If the defendant's theory as to the true construction of the contract, when the corporation compels a suit, is to obtain, then a policy like the present is of little worth. True, if a person, *sui juris*, chooses to make a foolish contract, he must abide by its terms; but should not the contract be so construed as to make its contemplated benefits available?

Despite some decisions to the contrary, this court cannot hold otherwise than that when suit has to be brought the recovery should be for the maximum insured, unless the defendant shows by pleadings and proof that said sum should be reduced. Even then the strange result would follow that as to each outstanding certificate-holder and his responsibility a controversy might arise. The further the inquiry is pursued, the greater the legal difficulties presented.

The motion for new trial must be overruled.

Erber & Stickler *v.* R. G. Dun & Co.

(Eastern District of Arkansas. April, 1882.)

1. Libel — Privileged Communications. — A communication is privileged when made in good faith in answer to one having an interest in the information sought, and it will be privileged if volunteered, when the party to whom it is made has an interest in it, and the party making it stands in such relation to him as to make it a reasonable duty, or at least proper, that he should give the information.
2. Mercantile Agency — Verbal Statements. — The verbal statements of a mercantile agency, made in relation to the plaintiffs' business credit and standing as merchants, to their subscribers, who had an interest in knowing the facts, and in answer to inquiries made by them, if made in good faith and upon information on which defendant relied, are privileged, and cannot be made the foundation of an action.
3. Communications — When Cease to be Privileged. — A communication which would otherwise be privileged, if made with malice in fact, or through hatred, ill-will, and a malicious design to injure, is not a privileged communication, but the burden of proof is on plaintiffs to show malice in fact.

4. LIBEL — ON MERCHANTS OR BUSINESS MEN.— Every publication, in writing or in print, which charges upon or imputes to a merchant or business man insolvency or bankruptcy, or conduct which would prejudice him in his business or trade, or be injurious to his standing or credit as a merchant or business man, is a libel.
5. SAME — "DAILY NOTIFICATION SHEETS" — RESPONSIBILITY.— Where defendants, in the course of their business, issued "daily notification sheets," and sent them to all their subscribers, irrespective of their interest in the question of the plaintiffs' credit and standing, and this sheet was distributed to persons having no interest in being informed of the condition of plaintiffs' firm, this fact robs it of the protection of a privileged communication, and if it contains a libel on the plaintiffs, defendants cannot escape responsibility for such libel on the plea that it was a privileged communication to their subscribers.
6. SAME — PROVINCE OF JURY.— Where such "daily notification sheet" contained the names of the plaintiffs, and opposite thereto the words "Call at office," it rests with the jury, in view of the definition of a libel, and considering all the evidence adduced and relating to these words, to determine whether they constitute a libel on the plaintiffs in their business as merchants.
7. SAME — MEASURE OF DAMAGES — PROVINCE OF JURY.— Where a publication is libelous, the law presumes that it was made with malice — technical, legal malice, but not malice in fact, — and the amount of damages depends in a large degree upon the motives which actuated defendants in its publication; and in such cases the law leaves it to the jury to find and return such damages as they think right and just, by a sound, temperate, deliberate and reasonable exercise of their functions as jurymen.

CALDWELL, *District Judge (charging jury).*— In the year 1880, and for some years prior thereto, the plaintiffs were partners engaged in the mercantile business at Texarkana, in the state of Texas. The defendants are partners engaged in conducting a mercantile agency, having their offices or agencies in many of the principal commercial cities of the United States and Canada. It is the business of defendants to collect, through the reports of local agents and from other sources, information as to the character, credit and pecuniary responsibility of merchants, traders, and others engaged in commercial pursuits throughout the country, and to impart the information thus acquired to their subscribers

verbally, on application therefor, and by means of a "daily notification sheet" printed and sent to their subscribers at the agency issuing such sheet. There are probably other modes of conveying to their subscribers such information, but they are not material to be considered in this case. The relations existing between the defendants and their subscribers is disclosed by the contract entered into between them, a copy of which is in evidence, and by the testimony in the case. The following is a copy of the agreement signed by the subscribers to the mercantile agency:

"TERMS OF SUBSCRIPTION TO THE MERCANTILE AGENCY.

"Memorandum of the agreement between R. G. Dun & Co., proprietors of the mercantile agency, on the one part, and the undersigned, subscribers to said agency, on the other part, viz.:

"The said proprietors are to communicate to us, on request, for our use in our business, as an aid to us in determining the propriety of giving credit, such information as they may possess concerning the mercantile standing and credit of merchants, traders, manufacturers, etc., throughout the United States and in the dominion of Canada. It is agreed that such information has mainly been and shall mainly be obtained and communicated by servants, clerks, attorneys and employees, appointed as our subagents in our behalf, by the said R. G. Dun & Co.; the said information to be communicated by the said R. G. Dun & Co. in accordance with the following rules and stipulations, with which we, subscribers to the agency as aforesaid, agree to comply faithfully, to wit:

"(1) All verbal, written or printed information communicated to us, or to such confidential clerk as may be authorized by us to receive the same, and all use of the reference book hereinafter named, and the notification sheet of corrections of said book, shall be strictly confidential, and shall never, under any circumstances, be communicated to the per-

sons reported, but shall be exclusively confined to the business of our establishment.

"(2) The said R. G. Dun & Co. shall not be responsible for any loss caused by the neglect of any of the said servants, attorneys, clerks and employees in procuring, collecting and communicating the said information, and the actual verity or correctness of the said information is in no manner guarantied by the said R. G. Dun & Co. The action of said agency being of necessity almost entirely confidential in all of its departments and details, the said R. G. Dun & Co. shall never, under any circumstances, be required by the subscriber to disclose the name of any such servant, clerk, attorney or employee, or any fact whatever concerning him or her, or concerning the means or sources by or from which any information so possessed or communicated was obtained.

"(3) The said R. G. Dun & Co. are hereby requested to place in our keeping, for our exclusive use, a printed copy of a reference book, containing ratings or markings of estimated capital and relative credit standing of such business men in such states as may be agreed upon, prepared by them or the servants, clerks, attorneys and employees aforesaid, together with notification sheet of corrections. We further agree that upon the delivery to us of any subsequent edition of the reference book the one now placed in our hands shall be given up to the said R. G. Dun & Co., it being clearly understood and agreed upon that the title to said reference book is vested and remains in said R. G. Dun & Co.

"(4) We will pay in advance —— dollars for one year's services from the date hereof of said R. G. Dun & Co., together with the use of said reference book pursuant to the foregoing conditions, and such other sum annually thereafter for the same as may be agreed upon between us, verbally or otherwise, subject always to the conditions and obligations above mentioned.

"(5) R. G. Dun & Co. are hereby permitted to reserve to themselves the right to terminate this subscription at any

time on the repayment of the amount for the unexpired portion thereof.

"(6) If the inquiries for detailed reports during the year shall exceed —— in number, the excess we agree to pay for at the rate of —— per hundred."

The following is a copy of the ticket of inquiry signed by the subscribers to the agency when they want information in relation to those with whom they have or expect to have business relations:

"THE MERCANTILE AGENCY.

"*R. G. Dun & Co.:* Give us in confidence, and *for our exclusive use and benefit in our business, viz.*, that of aiding us to determine the propriety of giving credit, whatever information you have respecting the standing, responsibility, etc., of:

Name..... Business .....
Town..... County.....
State.....
..... Subscriber.
St. Louis.....188
No....."

And it was in answer to inquiries thus made by subscribers who had business relations with or were creditors of the plaintiffs, that the verbal statements of the defendants in relation to the plaintiffs were made.

The plaintiffs do not contest the proposition that the business of the mercantile agency established and conducted by the defendants is, in its general features and purposes as disclosed by the evidence, both lawful and useful. It is unquestionably a lawful business, and it is now generally regarded as of utility and advantage to those engaged in conducting the business and commerce of the country.

In the fall of 1880 reports injurious to the credit and standing of the plaintiffs were in circulation in Texarkana. One of the plaintiffs tells you that these reports originated with one Kozminsky, another merchant and citizen of Tex-

arkana. In time some statement of these reports reached the mercantile agency of the defendants at St. Louis. In what terms these reports reached the defendants' agency at St. Louis is not very clear. The plaintiffs contend the reports made by Porter, or some one else at Texarkana, and given out by the defendants to their subscribers calling for the same, were to this effect, viz.: "Erber & Stickler are selling their goods below cost." "They are about to fail." "They have a bad business record." "Their creditors had better be on their guard and look after their claims."

Plaintiffs do not claim to have proven that defendants uttered or published all these statements to their subscribers. After critical examination of the depositions of the witnesses, in the light of the rules of evidence and the law applicable to the question, I feel justified in saying that the only sentence or clause of the alleged slanderous utterances set out in the complaint which is established by sufficient and legal evidence, or, indeed, by any evidence, is this: "Erber & Stickler are selling their goods below cost." But, in the view taken of the case by the court, it is not material to inquire whether the defendants uttered all the words alleged, or only part of them, or more. It is indisputable, under the evidence, that whatever was said orally by the defendants about the plaintiffs and their business was said in good faith and in confidence to their subscribers, who were by reason of their business relations with the plaintiffs interested in knowing their financial and business standing, and in answer to requests made by their subscribers in relation thereto, and without any malice in fact. This being so — and there is not the slightest evidence to admit of a conclusion to the contrary — the statements thus made by the defendants to their subscribers in answer to inquiries in relation to the plaintiffs are what the law terms "privileged communications." A communication is privileged when made in good faith in answer to one having an interest in the information sought; and it will be privileged if volunteered when the party to

whom the communication is made has an interest in it, and the party by whom it is made stands in such a relation to him as to make it a reasonable duty, or at least proper, that he should give the information.

Accordingly, the verbal statements which the defendants made in relation to the plaintiffs' business credit and standing as merchants, to their subscribers who had an interest in knowing the facts, and in answer to inquiries made by them, having been made in good faith and upon information on which defendants relied, are privileged, and cannot be made the foundation of an action. But a communication which would otherwise be privileged is not so if made with *malice in fact;* that is, through hatred, ill-will, and a malicious desire to injure; and a statement privileged in the first instance may lose its privileged character by being repeated and persisted in after knowledge of the fact that it is false or erroneous has been brought home to its author.

It is not contended that the defendants were actuated by actual malice in first making the statements in relation to the plaintiffs. But the learned counsel for the plaintiffs insist that there is some evidence, enough to make it the duty of the court to submit the question to the jury, that the defendants repeated and gave out the statements in relation to the plaintiffs after they had been informed of their false and erroneous character.

The burden of proof to show malice in fact is on the plaintiffs, and it should be reasonably clear and satisfactory. Malice in fact is never presumed; it is a fact to be proven; and if there is either no proof, or the proof is insufficient to warrant a verdict, it is the duty of the court to take the question from the jury. There is no evidence of malice in fact, and inasmuch as a verdict for the plaintiffs, based on the idea that the defendants were guilty of actual malice, would have to be set aside for want of evidence to support it, the jury are instructed to find for the defendants on all the paragraphs of the complaint based on oral statements of defendants to

their subscribers made under the circumstances indicated. This disposes of the causes of action set out in all the paragraphs of the plaintiffs' complaint except the sixth. The issue on this paragraph is the only one left for you to consider. That paragraph is based on the publication by the defendants on the thirteenth day of December, 1880, of what is known as the "daily notification sheet," on which appeared the name of the plaintiffs' firm and residence with the words, "Call at office," opposite thereto. These "daily notification sheets" were sent out by the defendants to all their subscribers in the city of St. Louis, numbering six hundred, irrespective of their interest in the question of the plaintiffs' credit and standing. *This sheet was distributed to persons having no interest in being informed of the condition of plaintiffs' firm.* This fact robs it of the protection of a privileged communication, and if it contains a libel on the plaintiffs, the defendants cannot escape responsibility for such libel on the plea that it was a privileged communication to their subscribers.

"At the present day the law in relation to libel is that the judge is not bound to state to the jury as a matter of law whether the publication complained of and sued for is a libel or not; but the proper course is for him to define what is a libel in point of law, and leave it to the jury whether the publication falls within that definition, and, as incidental to that, whether it is calculated to injure the reputation of the plaintiffs." 2 Greenl. Ev. § 411; *McDonald* v. *Woodruff*, 2 Dill. 244. Accordingly, it becomes the duty of the court to define what in law is a libel. *Every publication in writing or in print which charges upon or imputes to a merchant or business man insolvency or bankruptcy, or conduct which would prejudice him in his business or trade, or be injurious to his standing and credit as a merchant or business man, is a libel.*

It is your duty to determine whether the publication of the "daily notification sheet," containing the names of the plaintiffs, and opposite thereto the words "Call at office," is

a libel on the plaintiffs within this definition. Obviously these words taken by themselves, disconnected from everything else, do not import a libelous charge. But the plaintiffs claim that these words, in the connection in which they are used in this "daily notification sheet," have a fixed and settled meaning, well understood by the defendants and their subscribers, to whom the sheet was distributed, and that in substance and effect the meaning is that the defendants have information in relation to the parties named and their business damaging in its character, or well calculated to affect injuriously their credit, which information will be imparted to subscribers interested on request. The defendants deny that these words as used by them import any such meaning, or that they intend them to have any such meaning, or that they are susceptible of any such construction. Mr. Scranton, the manager of the defendants' agency at St. Louis, says that the words "Call at office," on the daily change sheet, "mean that we have in our possession information that may be beneficial to the subscribers with whom such trader deals;" and that information may be beneficial to subscribers, or of interest to them that is in no manner discrediting to the parties named, or calculated to affect injuriously their credit.

Keeping in view the definition of a libel which I have given you, and considering all the evidence relating to these words, as used by the defendants in their publication, it rests with you to say whether they constitute a libel on the plaintiffs in their business as merchants. If you believe from the evidence that the publication of plaintiffs' firm name in the manner stated was intended by the defendants to convey to their subscribers the statement, in substance or effect, that the defendants were in possession of information damaging to the credit and commercial standing of plaintiffs as merchants, and that such was the meaning attached, and intended to be attached, to these words by their subscribers, to whom the publication was sent, then the publication was equally significant and injurious, and equally libelous, as if

made in the distinct terms of such understanding on the face of the paper, and the plaintiffs are entitled to a verdict. It is not sufficient that one or more of the defendants' subscribers attached such injurious meaning to these words. It must appear either that such is the fair meaning or effect of the words in the connection in which they are used, or that such is the meaning attached to them by the defendants, and is the sense in which they intend their subscribers shall understand them, and that their subscribers, or some of them, or other persons, do attach such meaning to them.

If you find the publication referred to is libelous under the foregoing instructions, you will then have occasion to consider the question of damages. If the publication was libelous, then the law presumes it was made with malice, but the malice which the law affixes to a libelous publication is a technical, legal malice, and not malice in fact.

Malice in fact must be proven as any other fact. The law does not presume it, and the jury cannot infer it without evidence to warrant such inference.

The amount of damages depends in a large degree upon the motives which actuated the defendants in making the publication, and the circumstances under which it was made, all of which you will take into consideration, if your finding makes it necessary to consider the question of damages.

"The law leaves the amount of the damages in such cases to the sound judgment of the jury, reasonably, fairly and dispassionately exercised. This it does from necessity. If one man owes another so many dollars, or has taken from him so much property, or has broken a specific contract, there is something to *measure* (as the law terms it) *the amount of the damages or the recovery.* But in an action of this kind the law is unable to furnish you with any definite rule to measure the damages. It confides it to the sound, temperate, deliberate and reasonable exercise of your functions as jurymen. The law leaves the jury at liberty to find and return such damages as they think right and just;

but this is not a wild, unrestrained communal liberty, to be arbitrarily exercised, but the higher and better kind of liberty, viz., liberty restrained by reason and moderated by justice." *McDonald* v. *Woodruff*, 2 Dill. 248.

Opinion of the court delivered after argument upon prayers for instructions:

CALDWELL, *District Judge (orally).*— The first instruction asked for by the plaintiffs is as follows:

"The jury are instructed that the business of the mercantile agency established and conducted by the defendants, R. G. Dun & Co., is, in its general features and purposes, as disclosed by the evidence, both lawful and useful, and information, however defamatory, communicated by such agency in good faith, and believing it to be true, through the defendants, R. G. Dun & Co., personally, to merchants personally, and applying therefor to guide them in their business, is in law a privileged communication, for which no action can be maintained by the parties defamed except on proof of express malice; and if the defendants, R. G. Dun & Co., had only communicated by themselves personally, to such of their subscribers as personally made inquiries concerning the standing and credit of the plaintiffs, the reports complained of, the case would have come within the rule of law as to privileged communications. . . . No person other than the merchant *himself*, asking for information, has in law a right to read, hear, or receive said words, and to him they can be lawfully communicated only by the defendants, R. G. Dun & Co., *personally;* and the reading of said words by any person in their employ by their permission, or the delivery of a written or printed statement containing said words by their employees, with their permission, to the clerks of a merchant subscriber requesting information concerning the plaintiffs, or to such subscribers, was an unlawful publication, not at all within or protected by the rule of law as to privileged communications."

The instruction as asked concedes too much to the defendants, or not enough. If such communications are privileged when made to one or all the members of a mercantile firm, it is not perceived why they are not equally so when made to an agent of such firm authorized to receive them for the firm, or for his own guidance in the conduct of the business of the firm confided to his charge. If such communications made to an agent under such circumstances are not privileged, no more are they when made to a principal. Courts should not close their eyes to the necessary and uniform method of conducting business among merchants and other business men and corporations, and no rule should be adopted that will render impracticable resort to these necessary and convenient methods in any particular instance, or branch of their business, unless some principle imperatively demands it, or it can be shown some good results will flow from it; results actually different and better than obtain under existing methods.

The merchants and other business men of the country conduct their business to a very large extent through agents. A large proportion, if not all, of the principal commercial houses of the country employ commercial travelers, through whom sales are effected, credit extended, and collections made. In many of the houses there is what is usually termed the "credit man" of the house, whose special business it is to inquire in reference to the merit of all persons applying to purchase on credit, and who determines to whom credit shall be given, and the amount. The credit man of a house may or may not be a principal. It frequently occurs that he is a mere clerk or agent. Can it be sound law that a communication made to a principal in a house, to be by him immediately communicated to an agent of the house who conducts and controls the business to which such communication relates, is privileged, and that the same communication made directly to such agent is not privileged?

It is also said that while such information is privileged if

imparted by some member of the firm of Dun & Co., it is not so if imparted by a clerk or agent of theirs.

If the business of the defendants is lawful, then it may be conducted by the same agencies that are lawful in the conduct of any other business.

The distinction attempted to be drawn between the right to resort to the services of an agent in this business, and other legitimate business pursuits, is not well founded. It is not in harmony with the known and universal methods of conducting business. Commercial and other business pursuits are conducted chiefly by partnerships and corporations, and the former often, and the latter always, can act only by agents; and any rule of law that would deny to them the right to avail themselves of the services of an agent in every department of their business, and for every legitimate purpose connected with it, is unsound. What a man may lawfully do by himself he may do by an agent. The distinction taken between a communication to the principal and his agent in the case of *Beardsley* v. *Tappan*, 5 Blatchf. 497, is too refined. It is not supported by reason or authority.

Whether the information is given to the agent or his principal, it is in the end communicated to the person, be he agent or principal, for whose guidance it is intended.

The real question is whether such communications made by a commercial agency like that conducted by the defendants, are privileged in any case. The communications in this case were made orally, and in confidence and in good faith, by the defendants or their clerks, in answer to inquiries from subscribers who were creditors of plaintiffs, and therefore had an interest in knowing their standing and pecuniary condition as merchants. The relation existing between defendants and their subscribers is disclosed by a written contract signed by the subscribers. [For copy of this contract see charge of the court to the jury.] It is insisted the effect of this agreement is to make the defendants the agents of their subscribers, and that the privilege that attaches to

communications between principal and agent obtain for their protection.

It is questionable whether it is not pushing the doctrine of privileged communications beyond its legitimate scope to hold that a corporation or partnership, whose business it is to collect information in regard to the standing and financial condition of business men, which is imparted to subscribers for a money consideration, can invoke the doctrine of privileged communication for its protection. That verbal information given in good faith and confidentially by the principal in such an agency, to merchants who have an interest in knowing the condition of the person inquired about, is privileged, was decided in *Beardsley* v. *Tappan*, *supra*.

While the distinction taken in that case between such communications made to a principal and to his agent is not regarded as sound, it is authority to the point that between principal and principal such communications are privileged. The only case on this point decided by a court of last resort, brought to our attention, is *Ormsby* v. *Douglass*, 37 N. Y. 477. That case is on all-fours with the case at bar, and in the absence of opposing authority on the question, we incline to assent to its reasoning and to follow it. In the opinion of the court in that case, delivered by Mr. Justice Woodruff, it is said:

"It is a general rule that confidential communications respecting the character of another, made to one who is interested in the communication and desires information as a guide to himself in the conduct of his own affairs and dealings with each other, are privileged and not actionable. Starkie, Slander, 321; *Bradley* v. *Heath*, 12 Pick. 163, and cases cited; 3 B. & P. 587; 9 B. & C. 403."

Again:

"Upon the same general principle merchants have an interest in knowing, and have a right to know, the character of their dealers and those who propose to deal with them, and of those upon whose standing and responsibility they, in the course of their business, have occasion to rely.

"As a necessary consequence, they may make inquiries of other merchants, or of any person who may have information; and if such merchant or other person, in good faith, communicates the information which he has, or thinks he has, the communication is privileged."

Again:

"Information of the description referred to being important, there is no legal objection to the employment of an agent to seek and communicate it; and the agent may properly be paid for his time, labor and expense in the pursuit of such information.

"If one merchant may employ his own private agent to seek and communicate such information (3 Denio, 110), there is no legal objection to the combination or union of two or more in the employment of the same agent. And, as a consequence, if an agent may act for several, he may make the pursuit of such information his occupation, and receive from those who desire to avail themselves of his services and his knowledge acquired in such occupation, a compensation therefor.

"In short, the inquiry is not how did the defendant acquire the information, nor whether he received compensation for the information he had gained, but was the occasion one which justified him in giving such information as he possessed to the applicant."

It is worthy of remark that the author of this opinion was afterwards United States circuit judge for the second circuit, and Justice Hunt, of the supreme court of the United States, was also a member of the court of appeals at the time the case was decided, and seems to have concurred in the opinion.

The case of *Sunderlin* v. *Bradstreet*, 46 N. Y. 188, does not overrule or conflict with *Ormsby* v. *Douglass*. The question in the two cases was not the same.

The sixth paragraph of the complaint in this case raises the precise question decided in *Sunderlin* v. *Bradstreet*. That paragraph is as follows:

"That said R. G. Dun & Co. publish and issue daily, in

their business, unto upwards of ten thousand persons or business firms in the United States and dominion of Canada, a certain publication termed a 'daily notification sheet,' in which they purport to give the names of all persons or business firms in the United States of and concerning whom they have information of insolvency, bankruptcy, or approaching or impending insolvency or bankruptcy, or of such damaging character as to honesty, integrity and financial worth as to give it to be understood that they are no longer worthy of credit, and against whom creditors of such persons or business firms had better take immediate proceedings to secure or collect their claims; that whenever said R. G. Dun & Co. desire to give said defamatory matter to be understood by merchants, they publish and print the name of such person or business firm of and concerning whom such defamatory matter is intended to be conveyed in said 'daily notification sheet,' with the words 'Call at office' opposite the same.

"And plaintiffs allege and say that with the intent to give it to be understood of and concerning the plaintiffs that they were dishonest, were about to become insolvent and bankrupt, and defraud their creditors, and that their creditors had better proceed against them to secure or collect their respective claims and demands, and that plaintiffs no longer were entitled to or worthy of any credit, they, the said R. G. Dun & Co., did, on or about the thirteenth day of December last past, and on divers other days since, publish and print the plaintiffs' firm name on the said 'daily notification sheet,' with the words opposite thereto of 'Call at office,' which meaning as aforesaid was well understood by all to whom said sheet was delivered, being about ten thousand merchants or business firms in the United States."

This daily notification sheet was sent to all the subscribers to the agency in St. Louis, without regard to the question whether they had any interest in the defendants or their business. As a matter of fact not one per cent. of the sub-

scribers to whom it was sent had such interest. It is too clear for argument that if this sheet contains a libel on the plaintiffs the defendants cannot avail themselves of the plea that it was a privileged communication. Whether there is anything in it that constitutes a libel on the plaintiffs will be left for the jury to determine under appropriate instructions.

Judge Cooley, in his treatise on the Law of Torts, p. 217, says: "But if one makes it his business to furnish to others information concerning the character, habits, standing and responsibility of tradesmen, his business is not privileged, and he must justify his reports by the truth." The cases cited do not support the broad language of the text. If the information referred to is given out publicly, or in written or printed sheets sent to subscribers generally, without regard to their interest in the parties named therein, it is not privileged (*Sunderlin* v. *Bradstreet*, *supra*); but if it is given confidentially and in good faith, on request of subscribers having an interest in the person and his business to whom the inquiry relates, it is privileged. *Beardsley* v. *Tappan*, 5 Blatchf. 497; *Ormsby* v. *Douglass*, 37 N. Y. 477. The learned author doubtless had reference to information conveyed in the mode first stated, or in some general or public manner, and not to oral and confidential communications made in answer to inquiries from subscribers directly interested.

THOMAS and others *v.* ARMSTRONG and others.

(Western District of Missouri, Western Division. May, 1882.)

1. ESTATES OF DECEASED — DESCENT AND DISTRIBUTION. — Where a second wife recovered judgment against a railroad company for the death of her husband by its negligence, and invested the proceeds thereof for the benefit of her children, and subsequently died, her heirs hold the estate in trust for themselves and the heirs of their father by a prior marriage, and the property or the proceeds thereof should be divided equally among the two sets of heirs.

Thomas and others v. Armstrong and others.

2. SAME — RIGHTS OF HEIRS BY FIRST MARRIAGE. — Where heirs of a first marriage were in some way induced to believe that they were not entitled to any part of their money coming from their deceased father's estate until the youngest came of age, their delay until that time to assert their claims is not such laches as will deprive them of their rights.

In equity.

KREKEL, *District Judge.*— The controversy in this case is between two sets of children of Michael Armstrong, who at the time of his death resided in the state of Pennsylvania. He was killed in that state by the Catawissa Railroad in 1862. Armstrong was married twice; first with Mary A. Armstrong, of which marriage there are three children, the present plaintiffs, and next with Margaret Armstrong, of which marriage there are also three children, the present defendants. The laws of Pennsylvania in force at the time of the killing authorized the surviving widow to sue the railroad company for damages on account of the wrong, but required that the children of the deceased should be named in the declaration, and provided further that the money recovered should be divided by giving the widow one-third and the children the remainder in equal parts. Armstrong, the deceased, seems to have had so little property at the time of his death that no administration was had on his estate until long after his death, and then for the purpose of selling a small interest in a tract of land. The widow, Margaret Armstrong, sued the railroad company and recovered a judgment, which, after deducting attorney fees, costs and expenses, amounted to $3,044.20, the whole of which was paid to her by her attorneys in 1866. At that time the complainants in this bill, the heirs by the first marriage, were minors, girls,— twelve, fourteen and sixteen years old,— all married now; and they and their husbands are prosecuting this suit. The widow, Margaret Armstrong, removed from Pennsylvania in 1872, and came to Kansas City, where she bought

three lots in the west depot addition. One of these lots was sold under a deed of trust she had given. After living at Kansas City until 1876, she returned to Pennsylvania, and there died in that year. Her estate in Missouri has been administered, all the debts paid, and the two lots remaining of her purchase are in possession of defendants and claimed by them as her heirs.

The testimony in the case, with reasonable certainty, shows that the money she received from the railroad company on account of the death of her husband was used in the purchase and improvement of the property she owned in Kansas City, and the question is, shall it be subjected to lien to the extent of the claim of the children of the first marriage? That these children were entitled to one-half of the judgment recovered against the railroad company, after deducting one-third thereof, which came to her as widow, is not disputed, nor is it seriously questioned that the children of the first marriage were entitled to a share thereof. Laches is the plea by which their claim is sought to be defeated, and it is said that the probate court is the proper tribunal to adjudicate their rights. It may be true that the probate court in Missouri, having charge of her estate, might have allowed the claim of the complainants if presented, the consequence whereof would have been to sell and dispose of the remainder of her real estate, there being nothing else to satisfy such a claim. These defendants were certainly interested in not having the matter settled in that way, for it would have taken the whole of the estate. But it is argued that complainants are barred on account of their laches. The testimony tends to show that the children of the first marriage were in some way induced to believe that they were not entitled to any part of their money until the youngest sister came of age. As soon as this happened they took steps to recover their dues. They were in Pennsylvania, the property in Missouri. They cannot well be told that their delay shall deprive them of their rights, provided they can show the property or the pro-

ceeds thereof, when by doing so they cannot possibly wrong anybody, unless it be a wrong to point out to their relations that what they supposed they were heirs to, others had an interest in. The statute of limitations presents no bar, nor are the claimants bound to resort to law to obtain their rights. Being satisfied from the evidence in the case that the proceeds of the railroad judgment went into and constituted the fund by which the property of Margaret Armstrong was bought and improved, the judgment and decree of the court will be that the real estate in controversy be declared trust estate, to be sold for the benefit of the children of the first and second marriage; that an account be taken of valuable and lasting improvements made by the defendants, or either of them; the payment of taxes, insurance, and the value of the rents since the defendants had possession thereof. On the coming in of the master's report the proceeds will be equally divided between the complainants and respondents.

French & Dunlap, for complainants.

Jenkins & Twitchell, for respondents.

BEAN and others *v.* PATTERSON and others.

(Western District of Missouri, Western Division. October, 1881.)

1. INSOLVENT DEBTOR — PREFERENCE TO CREDITORS. — The creditors of a contractor in failing circumstances agreed together to buy his land, and to be interested therein in proportion to their several claims, and a deed therefor was made by the debtor and his wife to two of the creditors for the parties interested in the purchase; the purchase money to be made up of various items of indebtedness of the debtor to the parties interested in the purchase, who had, on their part, to remove the liens of two judgments, which judgments were not paid off, but were assigned to the parties to be held for contingencies. Subsequently an attachment was sued out against the land. *Held*, that the deed from the debtor and wife be set aside, and the deed of

sale of the land to one of the defendants, under an assignment of the trust deed of the wife made to her for a debt due her by the husband, be set aside; and that the land attached be sold, and the fund applied, first, to the payment of taxes; next, to the amounts of the judgments, with interest; next, the amount for which the deed of trust was assigned, with interest; and next, the complainants the amount of their judgment, with interest — the difference between the amounts of the wife's trust deed and the amount for which she assigned it to be reserved for further consideration.

In equity.

KREKEL, *District Judge.*— The bill in this case alleges that complainants in 1873 contracted with defendant William Miller for work to be done on a railroad then building in Ohio; that during the years of 1873 and 1874 work amounting to $16,000 was done under said contract; that on defendant's failing to pay for same, suit was instituted by plaintiffs in Atchison county, Missouri, and sundry tracts of land attached by virtue of process sued out; that judgment for $14,276 was obtained in the suit; that execution issued, and $3,257 and costs were collected thereunder; and that the remainder remains unpaid. The bill proceeds to allege further, that on examination of the title of the land attached, such as was not sold under the execution spoken of was found to be incumbered by liens, namely, a deed of trust given in 1873 by William Miller, the defendant in the attachment suit, to Patterson, as trustee for his wife, Mary Miller, for $10,000, due in 1876, and a judgment lien of Koontz for $2,071, which incumbrances, it is claimed, were made and sought to be maintained for the purpose of hindering and delaying the enforcement of liabilities of said William Miller, and specially the complainants, who instituted proceedings in the state courts to remove the clouds upon the title so as to enable them to sell the land and collect their claims. The proceedings spoken of, instituted in the state courts, were, by change of venue, removed into this court, and constitute the subject matter in litigation. The bill further charges that,

after the institution of their attachment suit and proceedings to remove the clouds from the title of the land attached, defendants William Miller and wife, on the third day of January, 1876, conveyed the whole of the land in litigation to Horn and Weaver, two of the defendants, but that, aside from them, other defendants were interested therein; that at the time of said conveyance the trust deed heretofore spoken of was pretended to have been assigned to defendant Saeger in consideration of $12,000; that said conveyance and assignment were in fact for the mutual benefit of the defendants named in the bill, and were contrivances to defraud the creditors of William Miller. The bill proceeds further to charge that the Koontz judgment was in reality paid off and satisfied, and kept alive by assignments, so as to incumber and cloud the title. The bill next proceeds to state that when the deed of trust fell due in 1876, Saeger, as assignee thereof, as stated, had the land thereby conveyed sold, and that he, Saeger, became the purchaser thereof, but that in fact said sale and purchase were made under the collusive arrangements charged, for the benefit of the conspirators. The bill thereupon prays that the deed of trust from William Miller to his wife be declared null and void; that the Koontz judgment be declared no lien; and that the defendants interested be made to account for the rents and profits of the land during the time they had the same in possession.

The defendants, answering the bill, say that the transactions had regarding the lands in controversy were all made in good faith and for valuable considerations; deny the intent of hindering or delaying creditors and their liabilities for rent.

The testimony tends to show that William Miller, about 1870, was a man of considerable property, engaged in large undertakings as a contractor; that his own means were not sufficient to carry them on; that his wife owned property worth $14,000, aside from a farm which Miller purchased and had conveyed to her; that to raise funds for his purposes he

borrowed money as early as 1870 and 1871, and to secure it Mrs. Miller's property was mortgaged; that the property mortgaged was sold and the debts incurred by Miller paid with the proceeds. The preponderance of the testimony shows the indebtedness from Miller to his wife to have existed long prior to any claim the complainants had against Miller; indeed, the trust deed given by William Miller to his wife was made and recorded about the time the work under the contract between Miller and the complainants was done. Stress is laid by complainants on the fact that Mrs. Miller assigned her deed of trust to Saeger, one of her husband's creditors, who is charged to be in the combination and conspiracy to defraud, hinder and delay Miller's creditors. But for this fact there could scarcely be any doubt that Mrs. Miller would be entitled to her deed of trust and the control of it. Is this fact alone, without any proof of her acting in bad faith, to deprive her of the right to dispose of her property as she chooses?

The law allows the wife to hold property and deal with it in her own way, and the rules applicable to dealings generally apply to her. When there are questions as to whether the wife has property of her own, and doubts exist whether the husband is seeking to use the wife's name to cover up his property from creditors, the acts done between husband and wife pertaining to property claimed by the wife will be closely scrutinized to see that their dealings are in good faith. So, also, in cases where the property of the wife, by her consent, is so mixed up and used by the husband that it cannot well be distinguished.

In the case before the court the assignment made of the trust deed to Saeger at most amounts to but a choice among creditors of her husband, for there is not a doubt that Saeger was a *bona fide* creditor of her husband. Nothing went to the wife under the assignment of her deed of trust. It is quite clear from the testimony that in 1876 and long prior thereto Miller was indebted to Saeger, Horn, Weaver and

the Bank of Catasauqua, and, finding that he was in failing circumstances, they agreed together to buy the land in controversy, and to be interested therein in proportion to the amount of their several claims against Miller. They purchased the land at $36,400, and the deed therefor was made by Miller and wife to Horn and Weaver for the parties interested in the purchase. The testimony shows the purchase money to have been made up of various items of indebtedness of Miller to the parties interested in the purchase. The purchasers had to remove the liens of two judgments,— one in favor of Koontz, now amounting to near $4,000, and another to Van Sycle of $700,— which were liens on the land, to make good their title. These judgments were not paid off, but were assigned to the parties interested to be held for contingencies. Six thousand of the $36,400 were retained by the purchasers for the same purpose. What these contingencies were is not difficult to define. An attachment for $16,100 had been sued out by complainants and levied on the land in controversy. Notice had been filed in the recorder's office of Atchison county of the levy of the attachment at the time of issuing the same. Contingencies arising from this source were to be provided for, and hence the precautions taken. The whole transaction amounts to this: Here are a number of creditors seeking to collect their debts. By the purchase of the farm they get into their possession all the debtor had. The deed of trust and the judgments were liens on the land prior to the attachment, and could not, therefore, be defeated by it. If the attachment prevailed over their deed, the amount of the deed of trust and moneys advanced on the judgment would be refunded, so that nothing could be lost in that direction, but something might be saved, if the farm sold for more than the liens, debts and the attachments.

This being the condition of the case, the court sees no difficulty in arriving at a proper adjustment of the matter. The deed from Miller and wife to Horn and Weaver, dated January 3, 1876, will be set aside and held for naught.

Saeger, as assignee of the trust deed of Mrs. Miller, having caused the land to be sold under the trust deed, himself becoming the purchaser and taking a deed therefor, that deed will be set aside and for naught held. The case will be referred to a master to take an account for rents since the possession taken under the deed from Miller and wife to Horn and Weaver, and report the value of any permanent improvements or repairs made during the time of their possession, and the amount of taxes paid thereon, and taxes now due, if any. Upon the coming in of the master's report an order of sale will be made for the whole of the land attached, excepting the quarter section sold by the sheriff, the proceeds whereof have been paid to the complainants. The funds will be applied as follows: First, to the payment of unpaid taxes; next, the amounts of the Koontz and Van Sycle judgments, with interest; next, the amount for which the deed of trust was assigned, with interest (the difference between the amount of Mrs. Miller's trust deed and the amount for which she assigned it to Saeger is reserved for further consideration); next, the complainants the amount of their judgment, with interest.

Botsford & Williams and *John P. Lewis*, for complainants.

Vories, Pike & McKillop, for respondents.

BULLOCK & CO. *v.* STCHERGE & SWIND.

(District of Iowa, Central Division. ——, 1882.)

1. CONTRACT OF SALE — STATUTE OF FRAUDS — DELIVERY TO COMMON CARRIER. — A delivery of goods by a vendor to a common carrier is a delivery to the vendee, though such carrier was not designated by him, and under the provisions of the Iowa statute of frauds, that no evidence of any contract for the sale of personal property is competent when no part of the property is delivered and no part of the price paid, such a delivery is sufficient to take the contract without the statute.

The material facts of this case appear in the opinion.

LOVE, *District Judge.*— The question presented upon the facts of this case is whether or not the delivery of goods under an oral contract of sale to a common carrier (not designated by the purchaser) in the usual course of transportation is sufficient under the Iowa statute of frauds to bind the contract.

The language of the Iowa statute, it will be seen, differs very materially from that of England and many of the states of the Union. The Iowa statute of frauds provides that it shall embrace, among other contracts, "those in relation to the sale of personal property when no part of the property is *delivered* and no part of the price paid."

The language of the English statute is somewhat different. It provides:

"That no contract for the sale of any goods, wares and merchandise for the price of ten pounds sterling or upwards shall be allowed to be good except the buyer shall *accept* part of the goods so sold and *actually receive* the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized."

In many of the state statutes, and among them those of New York, Massachusetts and Georgia, the same words, "accepted and received," are used, and these words have been expounded by many English and American decisions. Unquestionably, wherever these words have been used, it has been held that in order to dispense with the necessity of writing, the goods must be both "*accepted*" and "*received*," and that one or the other is not sufficient. It is well settled in England, New York, Massachusetts, Georgia and other states, that the mere delivery of the goods is not sufficient under the statute, because the words "delivery" and "received" are "correlative terms," and, therefore, that the goods must not only be "delivered," or "received," but also

accepted, in order to comply with the terms of the statute. But delivered and accepted are not, according to the decisions, equivalent terms. Goods may be delivered and not accepted, but, on the contrary, rejected as not corresponding to samples, or as otherwise contrary to the conditions of the contract. Hence it has been held in England and in the states referred to, that delivery to a common carrier is not sufficient under their statutes of fraud, because the carrier is authorized to "receive," but not also to accept goods for the vendee, while the statute requires that they shall be both received or delivered and accepted in order to bind the bargain without writing. But the decisions in England and the states referred to at the same time hold that a delivery to a common carrier, though not designated by the purchaser, is a good and perfect delivery to the latter; that the carrier is *quoad hoc* his agent; that the possession is after such delivery in the purchaser, and the goods at his risk; that the lien of the vendor for the price is upon the delivery to the carrier lost, by reason of the fact that the possession has been transferred from him to the purchaser; and that the vendor's only remaining right to the goods after such delivery is that of stoppage *in transitu*.

But these decisions further hold that the common carrier is the agent of the vendee for the purpose of delivery only, and not of acceptance. The common carrier cannot accept for the vendee, because acceptance implies assent that the goods are in accordance with the contract. Acceptance implies a mental act; it is by such mental act that the purchaser finally gives assent to the performance of the contract by the vendor, as being in full compliance with the terms of the contract of sale.

Such was the exposition of the words "accepted and actually received" by the courts of England and the American states. But we see that these words are entirely omitted in the Iowa statute, and the word delivery alone used, and that the word delivery, according to the adjudications, had been held to

be equivalent to "received." There is no word in the Iowa statute equivalent to the word "accepted." Can we suppose that the codifiers were ignorant of the previous adjudications as to the meaning of the words "accepted and received?" Can we assume that they omitted the word "accepted," or any equivalent term, from the statute unintentionally or by mere accident? Such assumptions would be violent and untenable. We must conclude that the word accepted was omitted intentionally, and that the purpose of the legislators was that delivery alone without "acceptance" should be sufficient to dispense with the necessity of writing. Nor was this change of phraseology without good and solid reasons in the minds of the framers of the Iowa statute. The delivery of the possession of goods is an open, visible, tangible act. It is a physical fact, manifesting the intention of the parties. A sale, therefore, with delivery of possession is a totally different thing from a sale by mere words without any outward symbol of the intention of the parties. A sale by words only would open the door to fraud and false swearing. A sale with delivery removes this danger as far as it can be removed, and to the extent that the statute of frauds intended to remove it. Delivery of possession, therefore, accomplishes the very purpose of the statute, and the mere act of acceptance could add little or nothing to that purpose. Hence was the word accepted omitted from the Iowa statute.

Now delivery to a common carrier is not only an open and visible act, calculated to satisfy the policy of the statute, but it is ordinarily susceptible of more satisfactory proof than a delivery direct to the vendee would be, since in many cases he would be the only witness of delivery, while delivery to a common carrier could always be proved by many disinterested witnesses.

Again the Iowa statute is, by its express terms, a statute of evidence. "No evidence of the contracts enumerated is competent without writing, unless the goods be delivered," etc. In this it differs somewhat from the terms of the

English statute, which provides that no *action* shall be maintained upon any of the contracts named which shall not be in writing, etc. The purpose of the Iowa statute was to prescribe a mode of proof which would, as far as possible, avoid the danger of fraud and perjury. Its framers must have known that it had been settled that delivery to a common carrier is a good and perfect delivery, and we may assume that they saw clearly that such a delivery would be more susceptible of certain proof as evidence of the bargain, and less exposed to the danger of perjury and fraud than any direct delivery to the purchaser could possibly be. Proof of a direct delivery by the vendor to the vendee might rest upon their own testimony, whereas delivery to a common carrier might be shown by the testimony of the intervening agents and by the very circumstances of the transaction. Hence a delivery to a common carrier would more effectually accomplish the purpose of the statute than a direct and immediate delivery to the vendee.

But again, let us consider the effect in commercial transactions of a rule that nothing short of acceptance by the vendee is sufficient to bind an oral contract for the sale of goods. The distant merchant visits the city and makes his purchases orally. It would be highly inconvenient to require that all such purchasing contracts should be reduced to writing. Now, if nothing short of the acceptance of the goods by the purchasing merchant when they reach him would make the contract valid and binding under the statute of frauds, how could the selling merchant with any safety whatever venture to forward the goods? The goods might be in strict accordance with samples, if sold by sample, or with the terms of the oral contract, if sold otherwise, and yet the purchasing merchant would be at perfect liberty to reject them without incurring the least liability. The purchasing merchant might simply say: "True, the goods are right. They are in strict accordance with the samples and the contract, but there was no writing and I have not yet

accepted them; therefore I will simply throw them on your hands." But suppose the vendor may bind the bargain by delivering the goods to a common carrier in the regular course of business, he can with safety forward them, and the vendee, when they reach him, would still be at liberty to refuse them, if unsound, or otherwise not in accordance with the contract. The vendee could thus hold the vendor to a strict compliance with his contract, but he could not at his mere caprice, or as his interest might dictate, reject the goods to the serious loss and inconvenience of the vendor.

Thus the delivery to the common carrier would simply take the place of writing to withdraw the contract from the operation of the statute of frauds. Even if the contract were in writing, the vendee might refuse to accept the goods. Indeed he might reject them, notwithstanding the writing, as not in accordance with samples or the conditions of the contract. This he would, of course, do at his peril, and if the vendor could show that the goods were in strict accordance with the contract, the seller could make the vendee liable as upon a breach of the contract. Precisely the same results would follow if it be the law that delivery to a common carrier takes the case out of the statute. In Benjamin's learned work upon sales, sec. 675, we find the following: "When questions arise as to the 'actual receipt' which is necessary to give validity to a parol contract for the sale of chattels exceeding ten pounds' value, the judges constantly use the word 'delivery' as the correlative of 'actual receipt.'" Citing *Carter* v. *Kingman*, 113 Mass. 517. Mr. Justice Blackburn, in commenting on this clause, makes the following remarks: "If we seek for the meaning of the enactment, judging merely by the words, and without reference to decisions, it seems that the provision is not complied with unless two things concur; the buyer must accept and he must actually receive part of the goods, and the contract will not be good unless he does both. And this is to be borne in mind, for as there may be an actual receipt without accept-

ance, so may there be acceptance without any receipt." Benjamin on Sales, sec. 139. Again: "The receipt of part of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such receipt is often evidence of acceptance, but it is not the same thing. Indeed the receipt by the buyer may be and often is for the express purpose of seeing whether he will accept them. If goods of a particular description are ordered to be sent by a carrier, the buyer must in every case receive the package to see whether it answers his order or not. It may even be reasonable to try a part of the goods by using them, but though this is a very actual receipt it is no acceptance, so long as the buyer can consistently object to the goods as not answering the order. It follows from this that a receipt of the goods by a carrier or on board ship, though *a sufficient delivery to the purchaser*, is not an acceptance by him so as to bind the contract; for the carrier, if he is agent to receive, is clearly not one to accept goods." Sec. 140. "And this," says Benjamin, "is also the law of the United States." Citing *Caulkins* v. *Hellman*, 47 N. Y. 449.

The same distinction between the acceptance and receipt of goods is taken in Georgia. *Lloyd* v. *Wright et al.* 25 Ga. 215, the court say: "The statute requires that the purchaser should 'actually receive the goods.'" And although goods are forwarded to him by a carrier by his direction, or delivered abroad on board a ship chartered by him, still there is no acceptance to satisfy the act so long as the buyer continues to have the right to object either to the *quantum* or quality of the goods.

The case of Dutton, 3 B. & P., relied on, was a mere question of what constituted a good delivery. It consequently does not meet the question now presented. The decision there was, that a delivery of goods by the vendor in behalf of the vendee to a carrier not named by the vendee was a delivery to the vendee. That is, it was a good delivery to

bind the contract, but not a sufficient delivery to take the case out of the statute of frauds, which requires that the goods should be "actually received" to come within the meaning of the statute. Hence it is evident that if the language of the Georgia statute had been simply "delivery," the delivery to the carrier would have been held sufficient.

Again, Benjamin, sec. 804: "A delivery of goods to a common carrier for conveyance to the buyer is such a delivery of actual possession to the buyer, through his agent, the carrier, as suffices to put an end to the vendor's lien." Citing a large number of authorities. See also sec. 675.

Again, Benjamin, sec. 181, says: "It is well settled that a delivery of goods to a common carrier *a fortiori* to one specially designated by the purchaser for a conveyance to him, or to a place designated by him, constitutes an *actual receipt* by the purchaser. In such cases the carrier is in contemplation of law the bailee of the person to whom, not by whom, the goods are sent, the latter in employing the carrier being considered as the agent of the former for that purpose. It must not be forgotten that the carrier only represents the purchaser for the purpose of receiving, not accepting, the goods. The law of the United States is the same. *Cross* v. *O'Donnell*, 44 N. Y. 661; *Caulkins* v. *Hellman*, 47 N. Y. 449." Citing a large number of English and American cases in note "G."

In note "G" it is said: "It is not necessary that the purchaser should employ the carrier personally or by some other agent than the vendor. We see no reason why a delivery to a warehouseman should not have the same effect. *Merchant* v. *Chapman*, 4 Allen, 362; *Hunter* v. *Wright*, 12 Allen, 548–550. The doctrine in section 181 is repeated with some emphasis in section 693. In *Phillips* v. *Bistolle*, 2 B. & C. 511, the court say: "To satisfy the statute there must be a delivery of the goods by the vendor with intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with an intention of tak-

ing to the possession as owner." Id. 142. And in note G: "A mere delivery is not sufficient; there must further be an acceptance and receipt by the purchaser, else he will not be bound." Citing *Sheppard* v. *Pressy*, 32 N. H. 57. Again in the same note: "In truth the statute is silent as to the delivery of the goods sold, which is the act of the seller. It requires the acceptance and receipt of some part thereof, which are subsequent acts of the buyer. Foster, J., in *Boardman* v. *Spooner*, 13 Allen, 357; *Prescott* v. *Lock*, 51 N. H. 94."

Again, sec. 155: "In *Combs* v. *The Bristol and Exeter Railroad Co.*, Pollock, Chief Baron, said the 'vendee should have an opportunity of rejecting the goods. The statute requires not only delivery but acceptance.' 'It may,' says Benjamin, 'be confidently assumed that the construction which attributes distinct meanings to the two expressions 'acceptance' and 'actual receipt' is now too firmly settled to be treated as an open question, and this is plainly to be inferred from the opinions delivered in *Smith* v. *Hudson*." Sec. 156. And in sec. 157: "That acceptance may precede receipt. *Cusick* v. *Robinson*, 1 B. & S. 299."

Again, sec. 160: "It is settled that the receipt of goods by a carrier or wharfinger appointed by the purchaser does not constitute acceptance; these agents having authority only to receive and not to accept the goods for their employers. But it is held that if after acceptance the vendor delivers the goods to a carrier named by the purchaser, the receipt of them by the carrier is a receipt by the purchaser." Note *a* to same section. See *Burnside* v. *Rawson*, 37 Iowa, 639; Code of Iowa, secs. 3663 and 3664; *Bennett* v. *Nye*, 4 Greene, 410; *Partridge* v. *Wilsey*, 8 Iowa, 459; *Caulkins* v. *Hellman*, 47 N. Y. 452; *Shindler* v. *Houston*, 1 Comst. 265, quoting statute, "The buyer should 'accept and receive some part of the goods,'" on page 265; *Outwater* v. *Dodge & Green*, 6 Wend. 400; *Remick* v. *Sandford et al.* 120 Mass. 315; *Norman* v. *Phillips*, M. & W. (14 Exch.) 277; *Combs*

v. *Railway Co.* H. & N. (Exch.) 515; *Frostburg Mining Co.* v. *New England Glass Co.* 9 Cush. 115.

Judgment will be for the plaintiffs.

Daniels & Hurd, for plaintiffs.

Pollock & McNulty, for defendants.

NOTE.[1]— The point ruled in the above case is new in this state; and inasmuch as the Iowa statute of frauds is peculiar, there is no adjudication found elsewhere. The principle is of first importance, and we are fortunate in that its first exposition is from so able and learned a jurist as Judge Love.

We believe the doctrine announced is altogether sound, warranted not only by reasoning from adjudged cases, but also by the necessities of our commercial system. It is apparent that a different rule would totally derange the present safe and convenient method of transacting business. It is true that nineteen-twentieths of the sales of personal property are by verbal contract, and are completed by delivery to a common carrier, and a rule that would nullify such exchanges would compel a rearrangement of business habits to the last degree embarrassing and annoying.

It will be noticed that three cases from our own supreme court are cited in the opinion. We are advised that it was urged in argument that those cases had established a contrary rule, and our only purpose in this note is to call attention to the questions already decided by our supreme court.

Bennett v. *Nye*, 4 G. Gr. 410, was an action for damages on a contract for the sale and future delivery of hogs. The question as to what constituted a delivery did not arise, the case holding only that the plaintiff might show by parol that at the time the contract was made the hogs were not owned by the defendant, that they were not ready for delivery, that labor, skill or money would necessarily have to be expended before they could be produced or delivered, and thus take the case out of the statute.

Partridge v. *Wilsey*, 8 Iowa, 459, was a case in which the question might have arisen, but from a careful examination of the opinion, we think it was not brought to the attention of the court. In the statement it is said that the goods were to be delivered in the city of Keokuk, and this fact may have determined that a delivery to a common carrier in New York was not a delivery within the meaning of the statute; but aside from this the only point mentioned by the court was, whether the

[1] From *Western Jurist.*

contract was taken out of the statute by reason of the fact that the goods were not ready for delivery, being in New York, and that money and labor must necessarily be expended in procuring them. The court held the contract within the statute without any consideration of the effect of a delivery to the common carrier; hence it cannot fairly be argued that it establishes a different rule than that laid down in the main case.

Burnside v. *Rawson*, 37 Iowa, 639, does not touch the point. In that case the vendor refused to make the delivery, and the court very properly ruled that the statute avoided the contract.

MELVILLE *v.* M. R. F. S. & G. R. Co.

(Western District of Missouri, Western Division. May, 1880.)

1. EMPLOYEE — UNSKILLFUL ACT — LIABILITY OF EMPLOYER. — The defendant company was bound to employ persons sufficiently skilled for the work for which they were employed; but having done so, is not liable for their careless or negligent acts. Neither is the employer liable for the neglect or carelessness of the employee unless such neglect or carelessness was habitual and was known, or by the use of reasonable diligence might have been known, to the employer, and was unknown to the plaintiff.
2. LABORERS who engage in joint work assume all ordinary risk growing out of the occupation and work in which they are engaged, including the acts of skillful co-laborers.
3. DUTY OF EMPLOYER TO EMPLOYES. — It was the duty of the defendant company to supply to the plaintiff suitable helpers, and the plaintiff had a right, in the absence of knowledge to the contrary, to presume that helpers employed were sufficiently skilled; but this obligation on the part of defendant is fully discharged if ordinary care was exercised by the foreman in the employment of helpers.
4. NEGLIGENT ACT OF A SKILLFUL WORKMAN. — If the helper was sufficiently skilled for the work in which he was engaged, and struck the blow which caused the injury negligently or carelessly, the defendant is not liable. The consequences of such acts are to be borne by those engaged in the common work.

KREKEL, *District Judge (charging the jury).* — The case about to be submitted to you, in the application of the principles which must govern it, is of importance, and deserves,

and I have no doubt will receive, careful consideration at your hands. Melville, the plaintiff in the case, sues the receiver of the Fort Scott Railroad Company for $10,000 damages on account of injuries received while in the employment of the company as a blacksmith. The injury for which the damages are claimed is the loss of one eye, which was caused, as alleged by plaintiff, by the unskillfulness of a helper or striker in the defendant company's employ. The evidence tends to show that Melville, on the eleventh day of August, 1876, was engaged upon a piece of blacksmith work in the shop of the defendant company. His usual striker or helper being absent, and he, Melville, needing help, rapped upon the anvil in the customary way for help, and one Matoon, a striker or helper of an adjoining fire, stepped up to answer the call. The piece of iron had to be bent in order to square it. After having been sufficiently bent over for squaring, a flatter was held over the bent part to be stricken sidewise by the helper so as to bring the bent iron plate to a square.

It is claimed by plaintiff Melville that in striking the flatter the helper did it so unskillfully that thereby a piece of iron was detached by the blow, which struck and put out his, plaintiff's, eye. All of this might be true as alleged by the plaintiff, and yet the company is not liable unless the striker was unskillful, applying the term unskillful to the work for which he was engaged. If the helper was skillful and struck a foul blow, or even if an unskillful blow did not cause or contribute to the injury, the consequences of such foul blow must be borne by the plaintiff, and the company is not liable therefor. All the defendant company is bound to do is to supply a sufficiently skilled striker or helper for the work in hand. It is not liable for neglect or carelessness of the helper unless such neglect or carelessness was habitual, and was known, or by the use of reasonable diligence might have been known, to the company, and was unknown to the plaintiff.

The law is that laborers who engage in joint work assume to run all ordinary risk growing out of the occupation and work in which they are engaged, including acts of skillful co-laborers. There are no complaints of any fault in the tools or appliances furnished by the company. Three questions are to be determined by you: 1st. Was the striker or the helper Matoon sufficiently skillful for the work in which he was engaged. 2d. Did plaintiff directly or indirectly contribute to the injury. 3d. Was the injury an accident. The law applicable to these several propositions I will proceed to discuss in the order in which I have stated them. Whether striking or helping in a blacksmith shop, or work such as has been testified to, is a skilled profession, to be learned by practice, and what amount of skill and practice is required to become a skillful striker, is for you to determine from the evidence. In trying to arrive at a proper conclusion you will carefully consider the testimony bearing upon the question, and take into consideration also the acts of the plaintiff. The testimony shows that plaintiff had been engaged in different companies' shops for five years before the occurring of the injury complained of. The knowledge he must have had of the work upon which he was engaged, and the amount of skill necessary on part of the helper to aid him; his knowledge of the helpers in the shop who could obey his call; his failing to complain,—all this will be considered by you for the purpose of arriving at the conclusion whether Melville considered such helpers, including Matoon, sufficiently skilled to aid him; for had he been dissatisfied he could have quit the service of the company at any time. Much has been said about rules, and the grading of mechanics in well regulated shops, inapplicable in this case. The Fort Scott Railroad Company had a right to make its own rules and regulations regarding its mechanics and the employment of its hands, and if the manner in which it was done was known to this plaintiff, he is supposed to have acquiesced in it, and has no cause of complaint, though such employment

and control differed from other similar or like establishments. It was the duty of the defendant company to supply suitable helpers, and the plaintiff had a right, in the absence of knowledge to the contrary, to presume that helpers employed were sufficiently skilled; but this obligation on part of the railroad is fully discharged if ordinary care was exercised by the foreman in the employment of helpers. Of this you are the judge under the testimony. To one thing I desire to call your attention specially, and it is this: that if you find, from the testimony, that Matoon was sufficiently skillful for the work in which he was engaged, and struck the blow which caused the injury negligently or carelessly, the railroad company is not responsible for the consequences of such neglect or carelessness. The consequences of such acts must be borne, as already stated, by those engaged in the common work.

Passing to the second proposition, the contributing on part of plaintiff to the injury, I may dispose of this branch of the case by saying that if you shall find from the testimony that plaintiff, by his own acts, materially contributed toward bringing about the injury complained of, he cannot recover.

I now pass to the third and most important part of the case, and invite your close attention thereto, namely, to the question, was the injury received by the plaintiff caused by an accident? It is for you, under the evidence, to determine whether the injury received by plaintiff was accidental. If accidental, the misfortune must be borne by him upon whom it falls. The law furnishes plaintiff no redress.

The theory is that either a scale or small piece of iron was detached by Matoon's blow from the flatter, which flew into plaintiff's eye and destroyed it. The flatters and hammers have been described to you. The testimony tends to show that both, when new, are made somewhat rounding on their face; that by the blows both the hammer and flatter are gradually flattened, presenting after considerable use ragged

edges, pieces of which by use are detached. It further appears from the testimony that the strokes, even when most carefully made by the best of strikers, do not always fall upon the same place on the face of the flatter. You have been told by the witnesses how, after long use, flatters wear down to near the edge. You must judge from the testimony and experience how many blows it takes to wear out a flatter, the use of flatters generally, the number of injuries similar to one under consideration occurring, and determine whether what happened was an accident or not. If you come to the conclusion it was an accident, the plaintiff is remediless and the company not liable.

National Water-Works Co. *v.* School District No. 7 of Kansas City.

(Western Division, Western District of Missouri. May, 1882.)

1. Construction of Ordinance — Public Buildings of the City — School Buildings. — An ordinance of Kansas City provides that the city may use and the water-works company shall supply water from its works "for use in all public buildings and offices of the city." *Held*, that the public school buildings of the city were included.
2. Contract — Construction Adopted by the Parties — Corporation. — The construction given to a doubtful provision by the parties to a contract, and affecting their interest only, often influences courts in their judgment, upon the reasonable presumption that the parties to a contract are in a condition to best know what was meant or intended by it, and, moreover, likely to guard their interest. But the rule has less force when applied to corporations which act through officials, who often have but a general public interest in the matters intrusted to them, and this is especially true of municipal corporations.
3. Cities, and School Organizations Therein. — The legislature of Missouri, by organizing district school organizations in cities, towns

and villages, intended nothing more than the separation of the control of the public schools from general municipal affairs, and the school buildings are the public buildings of the city, and not of the school district.

On motion to set aside nonsuit.

KREKEL, *District Judge.*— The controversy in this case between the water-works company and the school board of Kansas City has its origin in the construction of an ordinance under which the water-works of the city were built, incidentally requiring the ascertainment of the object and policy of that portion of the school laws of Missouri under which public schools in cities, towns and villages are organized. It appears that in 1873 the city of Kansas entered into a contract with the National Water-Works Company of New York for the construction of its present water-works, fixing the obligation and liabilities of the parties by an ordinance, the portion of which pertaining to this controversy reads as follows: "The city may also use and take, and the company is to supply from the water-works as now constructed and hereafter extended, water for use in all public buildings and offices of the city, and for any fountains the city may erect on the public grounds, and for any drinking places the city may choose to erect in any portion of the city, and for basins for watering stock from waste water out of such fountains. . . . Said company shall not have any pay or compensation for water the city may so use or take other than the hydrant rent, to be paid as by this ordinance is provided."

The question is, do the public school buildings come within the meaning of this ordinance, and are they public buildings of the city of Kansas, and as such to be supplied with water by the water-works company free of charge? The plaintiff claims they are not public buildings within the contemplation of the ordinance, and that they have not been so regarded, and hence the school board has made a verbal

contract with the water-works company by which they agree to pay for the water used by the public schools.

In 1873, the time when the water-works ordinance was passed, no school board of any kind existed, and the city, under its corporate authority, had full and complete control over its schools, as may be seen from the provisions of its charter, which are as follows: "The mayor and councilmen shall have power to sell in fee simple, lease, regulate or otherwise dispose of all lots of ground, and all money and property to which the inhabitants may be entitled for the benefit of schools, and may take all necessary steps to maintain suits to recover the same, or effect compromises with conflicting claimants, and to appropriate such money or property in such manner as they may consider advantageous to the support of schools."

At the time of contracting for the building of the water-works nearly all the public school buildings of Kansas City had been erected, and were occupied and used for school purposes. The present defendant corporation had no existence, and the city had entire control over its schools, including the right of property. Under such a state of facts, it would seem that scarcely a doubt could exist as to the school houses being public property, and within the spirit and meaning of the provisions of the ordinance. But we have the admitted verbal agreement of the present or some former school board with the water-works company to pay for the water used at the public schools.

Regarding this verbal agreement, it may be said that the construction given to a doubtful provision by the parties to a contract, and affecting their interest only, often influences courts in their judgment, upon the reasonable presumption that the parties to a judgment are in a condition to best know what was meant or intended by it, and, moreover, likely to guard their interest. The force of such reasoning is broken when we come to apply it to municipal corporations. They must of necessity have their affairs conducted

by persons selected according to law, who often have but a general public interest in the matters intrusted to them, are frequently changed, and not always the best calculated to construe contracts made by their predecessors. This is illustrated to some extent in the case before the court, in which school directors of one board contracted to pay, and the same or another set of directors afterward refused payment. A court asked to construe the provisions of a contract under such or similar circumstances may well hold itself free to do so without being influenced by the views entertained or even acted on by the corporators, especially in a case involving public interests, as the present one does.

Passing from the question of construction to the consideration of the nature of the two corporations, the present school board and Kansas City proper, it is contended for the water-works company that they are distinct bodies, each having its own property and exercising control over it, and that, therefore, with no propriety can the public school buildings, the property of the school board, be considered the property of Kansas City within the meaning of the water-works ordinance. We have already seen that at the time of the passage of the city ordinance contracting for the building of the water-works, the city of Kansas owned and had full control of its public schools and property pertaining thereto, and if any such control and ownership passed from it, it must have been when the present board of school directors was organized, which was long after the passage of the ordinance. The present school organization of Kansas City was effected under the act of 1877, according to the laws of Missouri on the subject of schools, and that part of it regarding schools in cities, towns and villages. How did the organization, under this act, affect the public schools of Kansas City, and the title to the property in them, and are the buildings in which they are kept no longer public buildings of the city? The law in reference to the organization of schools in cities, towns and villages, to which

reference has been made, provides "that any city, town or village, the plat of which has been previously filed in the recorder's office of the county in which the same is situate, may, together with the territory which is or may be attached thereto, be organized in a single school district, . . . and when so organized shall be a body politic, and known as school district No. — of —— county." Although the school district is designated a county district, yet that no change in the ownership of the property of the schools was thereby intended is indicated by the requirement that a plat of the city, town or village shall have been recorded, thus identifying the territorial extent of the *quasi* corporation, and making it identical with the city, town or village which has organized schools under its provisions.

It still more clearly appears that property rights were not affected thereby, for neither the act itself undertakes to transfer the property, nor is there power given therein for the transferring of any title the cities, towns or villages had to property pertaining to its schools.

If the intention of the law was to have the schools in cities, towns and villages disconnected from other municipal affairs, merely, there existed no necessity for authority to transfer property, and the absence of such a provision is accounted for. We take it that the legislature of Missouri, by authorizing district school organizations in cities, towns and villages, intended nothing more than the separation of the control of the public schools from general municipal affairs. This view is also supported by the provisions of the law intrusting the election of school directors of cities, towns and villages to their qualified voters, thus completely identifying the school districts with the corporations upon which they are ingrafted.

Regarding the duality of the corporation in this case, it may be further suggested that municipal corporations are the creatures of the legislative will, which uses them for its own purposes and ends. The distribution of municipal

affairs among designated bodies is of frequent occurrence, and these *quasi* corporations, as they are called, while acting independently within their assigned limits, are yet subordinate to the main corporation. Thus we understand the Missouri school law.

It has authorized the establishment of schools in cities, towns and villages, and intrusted the management and control of them and their property to separate organizations for convenience and as a matter of policy, and has made them corporations, in this case called district No. 7. That such a *quasi* corporation was to remain and continue to be a part of the main corporation we cannot doubt.

It may be further argued in support of the views entertained, that the grants of land by congress for school purposes of the sixteenth section in each congressional township is to the inhabitants of the township for the use of schools. The grants here referred to are at the basis of the organization of our school system. The special provisions of law regarding cities, towns and villages found in the Missouri statutes have their origin in grants made by the act of congress of the thirteenth of June, 1812. Under the succession of ownership of the country by Spain and France, certain grants of lands and lots had been made to towns and villages and their inhabitants, which grants were recognized by the national government after the cession of the territory. In order to settle the title to property granted before the change, congress passed the act of 1812 already referred to, thereby confirming the grants to the inhabitants in the towns and villages named in the act, and such lands as were not rightfully owned were reserved to the inhabitants for the support of schools. St. Louis, one of the villages named in the act, largely profited by the grant of vacant lots, and early organized schools under legislation to that end. Other villages did the same, and thus litigation for their benefit was ingrafted upon the school laws of Missouri, and under modification became, and now are, the laws regarding cities, towns and

villages. Kansas City, as we have seen, organized its schools under this law. It had no special grants of land, but constituted a part of one or more congressional townships, and thus obtained the benefit of the sixteenth section. The enabling act of 1820, authorizing Missouri to become one of the states of the Union, granted to the embryo state, among others, the following lands: "Section number 16 in every township, for the use of the inhabitants of such township for the use of schools." The grant is to the inhabitants of the townships, be they in a city, town, village, or in the country, without special organization. To the property derived from the source named the citizens of Kansas City generously added, until to-day they possess magnificent school buildings and schools. To the suggestion that the property belongs to school district No. 7 or the board of school directors, the citizens of Kansas City would readily and truthfully reply, we are school district No. 7, and the school board is ours. Neither can deprive us of our property, nor affect its character. To such argument there is no answer; nor is it invalidated by the part that a fraction of territory outside, but adjoining the city, may for convenience and its own benefit have connected itself with the school organization of the city, as under the law may be done.

The conclusions reached are that the verbal agreements made by the board of school directors in behalf of school district No. 7 with the water-works company, to pay for water used for public schools, was without consideration and void; that the public school houses of Kansas City are public buildings of the city within the meaning of the water-works ordinance, and that the water-works company is bound to furnish water for their use free of charge, other than provided in the ordinance.

Motion to set aside nonsuit denied.

STOKES *et al. v.* FINDLAY *et al.*

(District of Iowa. ——, 1879.)

1. CORPORATION — BANK — CORPORATE EXISTENCE — LIABILITY OF STOCKHOLDERS AS PARTNERS.— The Bloomfield bank was organized and commenced business without paid-up capital, without a sworn statement of its paid-up capital to the state auditor, and without any certificate from the state auditor authorizing the association to commence business — all these things being required by statute. Code of Iowa, sec. 1576. *Held*, construing said section with other provisions of the statutes of Iowa, that, notwithstanding these failures, there was an imperfect organization, and it was not the case of no corporation in which the incorporators would be liable to creditors as partners.
2. SAME — SAME — SAME.— If a corporation proceeds to exercise its powers without the performance of the required conditions, it proceeds irregularly, and both the corporation and its individual members may be subjected to the penalties and liabilities prescribed by law; but it does not follow that the corporation, by reason of its delinquency in this regard, loses or forfeits *ipso facto* its corporate existence.
3. INCORPORATION FOR PECUNIARY PROFIT — WHEN IT BECOMES A BODY CORPORATE.— Under the statutes of Iowa, a corporation for pecuniary profit becomes a body corporate as soon as the articles of incorporation are filed in the office of the recorder of deeds.

LOVE, *District Judge.*— This is a proceeding the purpose of which is to put the stockholders of the Bloomfield bank into bankruptcy. The very ground of this proceeding is that the so-called Bloomfield bank was in fact and in law no corporation at all; that the essential steps required by the law of Iowa to make it a corporation were not pursued; that these preliminary steps or requisites are in the nature of conditions precedent to the organization of a banking corporation; that the statute requiring the prerequisites in question is in its terms, and in the very nature of the case, mandatory, not merely directory, and that the defendants, having neglected to perform the preliminary and precedent conditions, failed to organize themselves into a corporation, but became

and were an association in the nature of a private partnership for the purpose of carrying on the business of banking.

The very able and ingenious counsel for the petitioning creditors admit that the true question is whether or not the Bloomfield bank was in fact and law a corporation. If it was a corporation, this proceeding against the stockholders as mere partners cannot be maintained; but the counsel contend that there was a total failure to organize a corporation according to the law of Iowa. They also concede that if there was a corporation, though ever so defective, these defendants may take shelter under it from the present proceeding; but the counsel insist that the question is not one of defective organization, since there was no organization at all under the law. It will be seen at a glance that if this view of the law be sound, it may be followed by most serious consequences, not only to the present defendants, but possibly to many other stockholders in corporations, standing in a like predicament, since it involves them in personal and individual responsibility for the debts of the association to which they belong, irrespective of any imputation of fraud or misconduct on their part.

It being conceded by the defendants, for the purpose of this decision at least, that the Bloomfield bank commenced business without paid-up capital, without a sworn statement of its paid-up capital to the state auditor, and without any certificate from the state auditor authorizing the association to commence business, the counsel for the petitioners place their denial of its existence as a corporation mainly upon section 1576 of the code, which is in these words:

"No association shall be organized under the provisions of this chapter with a less amount of paid-up capital than $50,000, except in cities or towns having a population not exceeding three thousand, where such association may be organized with a paid-up capital of not less than $25,000. But no association shall have the right to commence business unless its officers elect or its stockholders shall have furnished

to the auditor of state a sworn statement of the paid-up capital, and when the auditor is satisfied as to the fact, he shall issue to such association a certificate authorizing such association to commence business, a copy of which shall be published as provided in section 1571."

This section must undoubtedly be construed in connection with the provisions of chapter 1, title IX, of the code, providing for the organization of corporations for pecuniary profit; but, standing alone, will it bear the construction which the counsel seek to put upon it? True, it says that no association shall be organized under the provisions of this chapter with a less amount of paid-up capital than $50,000, etc.; but these words cannot be taken, as claimed by counsel, in their literal sense, for a moment's thought will make it apparent that the very terms of the section necessarily imply the existence of a corporation already organized. These words require what? A paid-up capital. And how could the capital be paid up without a previously organized corporation? To whom would the subscriber of stock pay his money, and from whom receive his certificate of stock, if no corporate body existed, with the proper officers duly elected and authorized to receive payment and issue the certificates of stock? But this interpretation of the section is placed beyond question by the words which immediately follow: "But no association shall have the right to commence business until its officers elect or its stockholders shall have furnished to the auditor of state a sworn statement of its paid-up capital," etc.

Now the duty here enjoined is to be performed by whom? By the officers elect or stockholders; and how could there be stockholders and officers elect without an organized corporation? These terms clearly and necessarily imply the existence of a corporation competent to issue stock to stockholders and to elect officers. It is evident, therefore, that we must seek some interpretation of the words "no association shall be organized," etc., which will bring them into harmony

with the implied fact of an existing corporation. Undoubtedly the true intention of the legislature was to provide that there should be no complete or perfect organization without the paid-up capital, the sworn statement and the certificate of the auditor; that is, that there should be no organization of a corporation which would authorize them to proceed with the ultimate business of the association without the prerequisites in question; without these prerequisites there would necessarily be an organization and a corporation, but it would be a defective organization. It would, therefore, be not the case of no organization, as counsel contend, but one of an imperfect organization. Hence the section further provides that "no association shall have the right to commence business until its officers elect or stockholders shall have performed the acts required of them." Here it will be perceived that the legal consequence annexed by the law to the failure to pay up the stock, make the sworn statement, and procure the certificate, is not that there shall be no organization or corporate existence, but that the association shall not commence business; that is, it shall not receive deposits, discount paper, issue circulation, etc.

In this clause the true distinction appears between the existence of a corporation and the right to exercise its powers. Its existence depends upon the fact of its organization; the right to exercise its powers may depend upon the performance of prescribed conditions. The former may clearly exist without the latter. It is by confounding this distinction that counsel have, in my judgment, been led into error in the exceedingly ingenious oral argument addressed to the court. It is by no means to be implied that because the law forbids an association to commence business or exercise its legitimate powers without the performance of certain conditions, it is thereby intended to deny its corporate existence as a consequence of the non-performance of the conditions. If the corporation proceeds to exercise its powers without the performance of the required

conditions, it proceeds irregularly, and both the corporation and its individual members may be subjected to the penalties and liabilities prescribed by law; but it by no means follows that the corporation, by reason of its delinquency in this regard, loses or forfeits *ipso facto* its corporate existence.

The distinction just referred to will be made quite apparent by reference to the general law of Iowa contained in chapter 1, title XI, of the code, providing for the organizations of corporations; chapter 9, title XI, which makes certain provisions in relation to banks organized under the laws of Iowa, and among them the provisions contained in section 1576, just considered, makes no provision whatever for the organization of banking corporations. Banking corporations, like all other corporations for pecuniary profit, are to be organized under the general law contained in chapter 1, title IX. Some conditions are annexed in chapter 9, title XI, upon which banking corporations may commence and do business, but we must look back to the general law to ascertain by what means these corporations may be formed, and upon what conditions their organization gives them corporate existence.

Now, if the question vital to the decision of the matter before me is, at what time, and on what conditions, does an association for pecuniary profit become a corporation under the general law of Iowa, this is by no means difficult to decide. Section 1058 provides that any number of persons may associate themselves and become incorporated for the transaction of any lawful business, etc.; and section 1060 provides that before commencing any business, except that of their own organization, they must adopt articles of incorporation, which must be recorded in the office of the recorder of deeds of the county where the principal place of business is to be, etc. And section 1064 enacts that the "corporation may commence business as soon as the articles are filed in the office of the recorder of deeds, and their doings shall be valid if the publication in a newspaper is made, and a copy

filed in the office of the secretary of state, within three months from such filing in the recorder's office."

At what point of time, then, does the association become a body corporate? Clearly as soon as the articles are filed in the office of the recorder of deeds; for at that moment the corporation may commence business, and it would be simply absurd to say that it might commence business as a corporation, and yet not be incorporate. It is the adoption of the articles of incorporation, and the filing of them with the recorder of deeds, that creates the corporation, for then it may commence business.

Here, again, the distinction broadly appears between the existence and the doings of the corporation, between its organization and its acts. Its organization, though not entirely perfect, is sufficient when its articles are filed to constitute it a corporation, for then it may commence business; but in order to make its organization perfect, and thus render its "doings" valid as to all the world, the requisite notice must be governed by publication and by the filing with the secretary of state. The statute does not provide that the corporation itself shall become invalid in consequence of the failure to publish the notice and file with the secretary, but only that its *doings* shall be thus invalidated; nor is what I here say at all inconsistent with what I have said in commenting on the terms of section 1576.

Section 1064 provides that the *corporation* may commence business as soon as the articles are filed in the office of the recorder of deeds. This is affirmative, and necessarily and in terms implies the existence of a corporation upon the filing of the articles.

The provision in section 1576, that no banking association shall have the right to commence business until its officers or stockholders shall have furnished the state auditor with a sworn statement of paid-up capital, etc., is negative, and it does not imply that no corporation shall exist till that act is done. The very terms, indeed, as I have shown, imply the

existence of a corporation whose officers or stockholders shall do the required act, and it only postponed the right of the corporate body to embark in its ulterior business of accepting deposits, loaning, discounting and issuing paper until the corporate body itself or its members shall make the sworn statement of paid-up capital and have obtained the auditor's certificate.

That the corporation itself is not invalidated, much less extinguished, by the failure to publish the notice and file with the secretary of state, or even by a failure to pursue substantially the steps required in its organization without some proper proceedings to forfeit its charter, clearly appears by section 1068. "A failure to comply substantially with the foregoing requisitions in relation to organization and publicity renders the individual property of the stockholders liable for the corporate debts."

Thus we see the distinction is clearly made between "organization" and "publicity," and doubtless the publication of notice and filing with the secretary appertain to the "publicity" rather than the "organization" of the body corporate. And what are the consequences which, by the terms of the statute, result from the failure to comply substantially with the foregoing requisitions? Does the corporation thereby have no existence or cease to exist? Does it follow from the failure that no corporation has been formed and that none in fact exists? Certainly not! for the statute evidently contemplates the continued existence of the corporation; else why does it provide that the stockholders' property shall be liable for the corporate debts? If no corporation had been formed there could be no corporate debts; for, if no corporation had been formed, the stockholders would be mere partners, according to the theory of plaintiff's counsel, and the debts would be partnership debts. If it had been the intention of the legislature to provide that a failure to comply with the provisions of the law respecting organization and publicity should result in making the stockholders

mere partners, it would have been absurd to provide that the individual property of the stockholders should be liable for the debts, since that would have been the result of the partnership without any such provision; but it is argued that a construction which recognizes the existence of a banking corporation without paid-up capital, as required by section 1576, cannot be correct, because it would be fatal to the ends of justice. The prepayment of the capital is the most essential condition of a banking corporation. It is the security of the public against fraud and loss. It is made the express duty of the "officers and stockholders" to make a sworn statement to the auditor of its paid-up capital, etc. Can they be permitted to acquire the privileges and immunities of a corporation without a compliance with the essential conditions of the law from which they derive their creation? Can any set of men be permitted to engage in the business of banking without a dollar of paid-up capital, and advertise themselves to the world, falsely, as having a certain paid-up capital, all in flagrant violation of the very law of their existence as a corporation, and yet claim exemption from personal responsibility for their debts and frauds by pleading the immunities of the very law which they have infringed? Such a doctrine, it is contended, would not only give immunity to fraud in this particular case, but it would encourage the commission of fraud in other cases.

This argument was urged with great subtlety and force by counsel, but I think the answer to it is both obvious and conclusive. That answer is that the consequences apprehended by counsel do by no means flow from the recognition of the bank as a corporation. It is true that by holding the association to be a corporation we preclude the liability of the members as mere partners, but it does not by any means follow that they are hence exempted from personal and individual liability for their alleged debts and frauds. In the first place, if the bank shall be adjudicated a bankrupt as a corporation, the assignee may compel all delinquent stock-

holders to pay up their unpaid stock. In the second place, I can see no reason why the assignee may not, by bill in equity or otherwise, make all stockholders who participated knowingly in the fraudulent organization or operations of the bank personally liable for all damages resulting to creditors from their fraudulent conduct. This could, in my judgment, be done upon the clearest principles of law and equity, irrespective of any statute; but there are sections of the statute providing in express terms for the protection of creditors in this regard.

Section 1071 provides that "intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their means or liabilities, shall subject those guilty thereof to fine and imprisonment, or both, at the discretion of the court. Any person who has sustained injury from said fraud may also recover damages therefor against those guilty of participating in such fraud." And section 1072 provides that the payment of dividends which leave insufficient funds to meet the liabilities of the corporation shall be deemed such frauds as will subject those therein concerned to the penalties of the preceding section, etc. See also sections 1573 and 1574.

Thus it appears that creditors are provided with ample remedies without denying the existence of the corporation, and by consequence subjecting the stockholders to liability as partners; and the remedies referred to are such as to enable the court to distinguish between innocent and guilty stockholders. There may be stockholders who in good faith paid up their stock, and who did not in any way participate in the original organization of the bank, and certainly it would be most unjust to involve them in the common ruin by confounding them with those who never paid a cent upon their stock, and knowingly participated in deceiving the public and defrauding creditors. If, on the contrary, the stockholders be made liable as partners, the honest man who in good faith paid up his stock to the last dollar without any

knowledge whatever of any purpose to evade the law, will be made personally liable for the entire debts of the bank in common with the stockholder or bank officer who paid not a cent upon his stock and knowingly aided in evading the law. This certainly would be a most unjust, not to say deplorable result.

It is apparent that the redress which the court proposes here to give the creditors is precisely consistent with the contract between the creditors and the bank, and the intention of all parties to that contract. The creditors did not deal with the Bloomfield bank as a mere copartnership, nor did they trust the members of the corporation as such. The creditors intended to give and did give them credit as an organized corporation. They did not rely in crediting the bank upon the individual and personal responsibility of the stockholders, and now to make the stockholders individually and personally responsible as partners, would result in giving the creditors what they did not expect or contract for. What the creditors did contract for, and what they did have a perfect right to demand, was that the capital should have been paid up by the stockholders according to law, and that there should have been good faith in the organization and operation of the bank; and precisely to this extent I propose to give the creditors redress.

The stockholders will, in my view, be compelled to repair the injury done to the creditors, by paying up their stock in full, and by making them compensation in damages for the consequences of their bad faith in failing to pay up their stock before the commencement of business. As the creditors did not intend to deal with the bank as a private partnership, so it is manifest that the stockholders did not intend to bind themselves to the creditors as copartners, and it would seem to be an extraordinary and illogical proceeding which should enforce a contract contrary to the intent and meaning of both contracting parties.

GOODNOW *v.* LITCHFIELD.

(District of Iowa, Central Division. May, 1882.)

1. REMOVAL — NOMINAL PARTY.— The joining in a suit of a merely nominal party can have no effect either in conferring or excluding jurisdiction; but, as a general rule, trustees and executors are regarded as active, and not merely nominal, parties.
2. SAME — SAME — COLORABLE ASSIGNMENT.— It will hardly do to affirm that a citizen of Iowa may enter into a contract with a citizen of New York, and, after incurring liability thereunder, may, for the purpose of defeating the jurisdiction of the federal courts, assign such contract, or his right of action thereon, to another citizen of New York, with an agreement that the latter shall prosecute suit to judgment and pay the proceeds, less costs and expenses, to the assignor, who is to remain the real litigant.
3. PETITION FOR REMOVAL — WHEN TAKEN AS TRUE.— Upon a motion to remand, the allegations of the petition for removal will be taken as true; but issue may be joined upon the truth of such allegations, and upon hearing the evidence, the court may dismiss or remand, if it appears that there is no jurisdiction.

MCCRARY, *Circuit Judge.*— This case is before the court on a motion to remand. The defendant petitioned the state court for a removal on the ground that the complainant, Goodnow, is only a nominal party, and that the controversy is between the defendant, a citizen of New York, and the Dubuque & Sioux City Railroad Company, a citizen of Iowa. It appears from the record that the claims sued upon were originally the property of the said railroad company, and that they were assigned to the plaintiff by an instrument in writing. By that instrument the plaintiff was to use and exercise reasonable diligence to enforce said claims, demands or rights of action, and after deducting all costs and expenses in so doing, to hold the proceeds or amounts collected "in trust for the use and benefit *of the parties owning the same.*"

The complainant and defendant are citizens of the same state, while the original parties were citizens of different states. The case, therefore, was removable alone upon the

theory that complainant is a nominal party only, and that the court can look to the controversy between him and the railroad — the assignor of the claims — to determine the question of the right of removal.

As a general proposition, it is well settled that the joining in a suit of merely nominal parties can have no effect either in conferring or excluding jurisdiction. *Brown* v. *Strode*, 5 Cr. 303; *Wormley* v. *Wormley*, 8 Wheat. 421; *Wood* v. *Davis*, 18 How. 467; *Foss* v. *Bank*, 1 McCrary, 477.

It is equally well settled that, as a general rule, trustees and executors do not belong to that class, but are regarded as active parties to the controversy; as parties to the contract whose duty it is to prosecute or defend suits arising upon it, and whose citizenship is looked to as determining the question of jurisdiction. *McNott* v. *Bland*, 2 How. 9; *Knap* v. *The Railroad Company*, 20 Wall. 117.

If the complainant in the present case is a trustee within the ordinary meaning of the term, appointed in good faith to collect the claims sued on and to pay the net proceeds to the parties who may be entitled to the same, then the court must look to his citizenship and not to that of the parties for whom he is such trustee. If, however, it be true, as alleged by respondent, that the assignment was not made in good faith and for the purpose of transferring to plaintiff the claim sued on, but for the purpose of depriving the respondent of his right to litigate this controversy with the assignor in this court, and to compel him against his will to submit that controversy to the state courts, then the important question arises, whether under such circumstances the cause was removable. It would hardly do to affirm that a citizen of Iowa may enter into a contract with a citizen of New York, and, having incurred liability thereunder, may thereafter, for the mere purpose of depriving such citizen of New York of his right to remove a suit upon such contract into this court, assign the contract, or the right of action arising thereon, to another citizen of New York, with an

agreement that he shall prosecute the suit to judgment, and shall pay the costs and expenses of the litigation, and pay the balance to the assignor, who is to remain the real litigant. If this can be done, then the laws of the United States conferring jurisdiction upon the courts of the United States in controversies between citizens of different states may be evaded and practically nullified by such colorable assignments. If, on the other hand, the complainant is a *bona fide* trustee, with authority to prosecute this suit to judgment, and distribute the proceeds, when collected, among numerous parties who may be equitably entitled to share therein, and the assignment has been made in good faith for that purpose, then there was no right of removal. The bill, and the assignment which is made a part of it, show that the complainant is to hold the sum collected, less expenses, "in trust for the use and benefit of the parties owning the same." The respondent assumes that this provision will require complainant to pay to the assignor (the railroad company) the net sum realized. This does not conclusively appear from the record. The complainant may be able to show by proof that such is not the case and that he is a *bona fide* trustee, and not a mere conduit to sue for and collect the money and pay it over to the assignor. For the purposes of this motion, we will assume the truth of the petition for removal, and the motion is therefore, for the present, overruled; but the complainant may take issue upon the facts by a plea in abatement, or otherwise; and if upon a hearing it turns out that this court has no jurisdiction within the rules laid down in this opinion, the case can then be dismissed or remanded.

Geo. Crane, for complainant.

Gatch, Wright & Gatch, for respondent.

The City of Le Mars *v.* The Iowa Falls & Sioux City R. Co. and The Illinois Central R. Co.

(District of Iowa. May, 1882.)

1. Removal — Citizenship of Parties — Act of 1875.— The general rules governing the construction of the second section of the act of congress of March 3, 1875, in so far as they have been determined by the supreme court, stated.
2. Same — Same — Separable Action.— Where a plaintiff has a cause of action against two defendants, one of whom is a citizen of the same state with plaintiff, and the other a citizen of another state, and where the proof is the same against both, and the same judgment is to be rendered against both, it is not a divisible or separable controversy, and therefore cannot be removed into a federal court upon the application of the non-resident defendant, on the ground alone of citizenship.

On motion to remand.

McCrary, *Circuit Judge.*— This proceeding was instituted by the city of Le Mars in the state court for the purpose of condemning certain real estate within the corporate limits of the city for street purposes. The defendant the Iowa Falls & Sioux City Railroad Company is the owner of the fee of said real estate, and is, with the plaintiff, a citizen of Iowa. The defendant the Illinois Central Railroad Company is the owner of a perpetual lease upon said real estate, and, being a citizen of Illinois, has removed the case to this court, claiming that there is a controversy wholly between it and the plaintiff, which can be fully determined as between them. The record shows that the principal controversy is as to the right of the city to condemn and take this particular real estate for street purposes. A secondary controversy will arise if the right of condemnation is upheld as to the amount of damages to be awarded. It is plain that the city has a right to proceed to condemn land for street purposes against all who have an interest in it, and especially against the owner of the fee. If it were conceded that two separate

suits could be maintained, the one against the owner of the fee, and the other against the lessee, it will scarcely be contended that the city could be obliged to divide its action in that way. The law looks with great disfavor upon any rule that will increase litigation by multiplying suits. It is now settled that so much of the act of 1866 (R. S. sec. 639) as expressly authorizes the splitting of a case, and the removal of a part of it to a federal court for trial, leaving another part in the state court, is repealed by the subsequent act of March, 1875. If any part of a suit is removed, the whole must be removed. The question remains to be determined, in what class of cases, if in any, can a cause be removed, where some of the parties litigant on opposite sides are citizens of the same state, and others are citizens of different states? The rules by which we are to be governed, so far as they have been settled by the supreme court of the United States, may be stated as follows:

1. If the parties to the suit can be placed on opposite sides of the real controversy, disregarding the mere form of the pleadings, so that all on one side are found to be citizens of different states from all on the other, the cause may be removed under the first clause of the second section of the act of March 3, 1875. *Removal Cases*, 100 U. S. 457.

2. Where a suit embraces two *distinct* controversies, one of which is between citizens of different states, while the other is between citizens of the same state, if the former is a separable controversy which can be fully determined without the presence of the parties to the latter, then either of the parties to the former may, under the second clause of the above mentioned section, remove the whole case. *Barney v. Latham*, 103 U. S. 205.

3. But congress has not provided for the removal from a state court of a suit in which there is a controversy not *wholly* between citizens of different states, and to the full or final determination of which one of the indispensable parties, plaintiffs or defendants, on the side seeking the removal,

is a citizen of the same state with one or more of the parties against whom the removal is asked. *Blake v. M'Kim*, 103 U. S. 336.

4. To authorize a removal under the first clause of the section above mentioned, all the parties on one side of the controversy must be citizens of different states from all the parties on the other. And to authorize a removal under the second clause of that section, there must exist in the suit a *separate* and *distinct* cause of action in respect to which all the necessary parties on one side are citizens of different states from those on another. *Hyde v. Ruhle*, January, 1882.

We are therefore to determine in each case whether the controversy arising between citizens of different states is a distinct and separate cause of action. No general rule for determining this question has been laid down by the supreme court; and it would, perhaps, be difficult to formulate one that would be applicable to all cases.

In the present case the plaintiff brought suit against two defendants, one of which is a citizen of the same state with plaintiff. The cause of action is against both; the proof must be precisely the same as to both, and the judgment, in so far as it establishes the right of condemnation, must be against both. Each might have a separate claim for damages; but that is a subordinate controversy, and one which cannot be considered until the main question is determined. Until otherwise instructed by the supreme court, this court will hold that in such a case the plaintiff cannot be obliged to litigate with both or either of the defendants in a federal court. The cause of action against one of the defendants is not separate and distinct from that against the other. The controversy is single and not divisible within the meaning of the rule laid down by the supreme court. If a party brings a suit in a state court against two or more defendants, upon a cause of action of such a character that he has a right to proceed to judgment against all, and where the same proof applies to all, it is not a divisible or separable controversy.

It follows that the motion to remand must be sustained, and it is so ordered.

This ruling applies to two other cases between the same parties, in which similar motions have been submitted.

John F. Duncombe, for Illinois Central R. Co.

Barcroft & Gatch and *G. W. Ayer*, for plaintiff.

Bailey *v.* American Cent. Ins. Co.

(District of Iowa, Southern Division. June, 1882.)

1. Equity — Correcting Mistake of Law.— A mistake of law, made through the representations of an agent, may be corrected in equity.
2. Same — Mistake in Insurance Policy.— If an applicant for insurance correctly states his interest, and distinctly asks for an insurance thereon, and the agent of the insurer agrees to comply with his request, and assumes to decide on the form of the policy, and by mistake of law adopts the wrong form, a court of equity will reform the instrument so as to make it insurance upon the interest named.
3. Insurance — Interest Insured — May be Enhanced.— A change of title which increases the interest of the insured, whether the same be by sale under judicial decree or by voluntary conveyance, does not defeat the insurance, as where the interest insured was that of a mortgagee, who afterwards obtains the full title.

In equity.

This is an action in equity, brought to reform a policy of insurance and renewal certificate, and to recover judgment for a loss sustained thereunder. The facts appear as follows:

That on or about October 24, 1878, complainant held a mortgage for $1,200 on a certain dwelling house and storeroom in the town of Kahoka, Clark county, Missouri, the legal title being in John Wagner.

On that day complainant, through his agent, A. J. Mathias, applied to defendant for the insurance of his interest in such property in the sum of $1,000, and paid the necessary pre-

mium for the insurance of such interest for the term of one year; that afterwards, on December 5, 1879, the policy so taken out was renewed for another year, complainant paying the premium therefor. N. T. Cherry, a practicing attorney of some years' experience, was the agent of defendant, and acted for it in relation to such insurance, receiving the premiums, and writing up both the policy and renewal certificates.

Wagner had agreed with Bailey to keep the property insured for the benefit of complainant, as mortgagee, but failed to do so. Mathias, at the time he sought the insurance, communicated these facts to Cherry, and asked to have Bailey's interest insured by the policy. Cherry told him that he could issue such insurance, but the policy would have to be written in the name of Wagner, with loss made payable to Bailey. Mathias said he did not know how the policy should be written, but he wanted it to cover Bailey's interest as mortgagee, and he testifies that he at the time believed he was having Bailey's interest insured, and trusted Cherry to write the policy correctly. Cherry wrote the policy, naming John Wagner as the assured, with this provision: "This company hereby agrees to recognize Noah Bailey as mortgagee under this policy; loss, if any, first payable to him as his interest may appear." He wrote the renewal certificate in the name of John Wagner, without any reference to Bailey. Bailey never authorized Mathias to insure Wagner, and nothing appears in the record showing that Wagner ever knew of the insurance.

On March 6, 1879, Bailey began a suit in the circuit court of Clark county, Missouri, to foreclose his mortgage on the property insured, and such proceedings were had therein that on October 25, 1879, a judgment against Wagner and a decree of foreclosure against the property were entered by that court, and a special execution was afterwards issued, and on April 9, 1880, the property was sold thereunder to the complainant herein. Of these proceedings the defendant

company had no knowledge. Upon November 24, 1880, the property insured, which was of greater value than the insurance named, was destroyed by fire. At the time of the original insurance, Wagner was in possession of the property, and at the time of the fire it was occupied by tenants of Bailey. The policy contained the following provision: "If the property be sold or transferred, or upon the passing or entry of a decree of foreclosure, or upon a sale under a deed of trust, or if the property insured be assigned under any bankrupt or insolvent law, or any change take place in title or possession (except in case of succession by reason of the death of the assured), whether by legal process or voluntary transfer or conveyance, then and in every such case this policy is void."

Proof of loss was in proper time made by complainant, and forwarded to defendant. John Wagner was made a party defendant, but, failing to appear, a decree *pro confesso* was entered against him at the May rules.

Hagerman, McCrary & Hagerman, for complainant.

W. J. Fulton and *H. Scott Howell*, for respondent.

McCrary, *Circuit Judge.*— The policy upon its face is for the insurance of John Wagner against loss by fire upon a certain building, and contains a provision recognizing the complainant, Noah Bailey, as mortgagee, and agreeing to pay the loss, if any, in the first instance to him, as his interest may appear. It is insisted on the part of complainant that this does not express the contract as intended by the parties; that it was so written by mistake; that the contract was for the insurance of the interest of Bailey as mortgagee, and not to insure Wagner's interest at all, and that it should be reformed so as to express that contract. The proof is that Wagner was the owner of the fee of the realty, and that Bailey held a mortgage upon it; that Wagner had agreed to insure it for the protection of Bailey, but had failed and re-

fused to do so; and that thereupon Bailey applied to respondent for insurance upon his interest as mortgagee. This application was made to the respondent through its agent, N. T. Cherry, who was a lawyer engaged in the practice of his profession, as well as an insurance agent, and who informed complainant's agent that it would be necessary to write the policy in the name of Wagner, loss, if any, payable to complainant. The complainant and the agent who acted for him were ignorant of the law upon the subject, and left it to Cherry to say what the form of the policy should be; but they did not fail to advise him that Wagner had failed and refused to insure the property, and that complainant desired an insurance upon his own interest as mortgagee.

Complainant paid the premium. Wagner paid nothing; authorized no one to obtain insurance in his name; and, so far as appears, had no notice that his name was used.

That the interest of a mortgagee is an insurable interest is admitted, and it follows that the policy might have been issued in the name of Bailey, and might have expressed a contract for the insurance of his interest as mortgagee.

The agent, Cherry, was therefore mistaken if he believed that, as a matter of law, it was necessary to write the policy in the name of the owner of the fee.

Where a mortgagee applies to the agent of an insurance company, and states plainly his wish to obtain insurance alone upon his interest as mortgagee, requests the agent to write the policy so as to effect this purpose, and relies upon him to determine as to what form is necessary under the law of insurance for that purpose, this court holds that the agent is bound to write a policy which shall insure the mortgagee's interest in his own name. This is not denied, but it is said that the parties in this case all understood that the policy was to be in Wagner's name; that it was understood and agreed between them that the policy should be written just as it is. It is very evident that the policy was not applied

for on behalf of Wagner, and that it was not the intention of the complainant to obtain a policy upon Wagner's interest. He (Wagner) was not present in person or by agent; he paid nothing and agreed to pay nothing; the use of his name was unauthorized by him.

Complainant had certainly no interest in procuring insurance for Wagner, and the latter's name was used only for the reason that Cherry asserted, and complainant's agent believed, that this was necessary as a means of insuring complainant's interest as mortgagee. It was not necessary for that purpose, and therefore the policy was so drawn by mistake, and whether a mistake of law or a mistake of fact is under the circumstances immaterial. The most that can be said in behalf of the respondent is that the complainant, through his agent, made a mistake of law through the representations of Cherry, who was a lawyer as well as an insurance agent, and in such a case a mistake of law may be corrected in equity. *Sias* v. *Ins. Co.* 8 Fed. Rep. 183, opinion by Lowell, C. J. See, also, *Keith* v. *Globe Ins. Co.* 52 Ill. 518; *Snell* v. *Ins. Co.* 98 U. S. 85; *Oliver* v. *Ins. Co.* 2 Curt. C. C. 277; *Woodbury Savings Bank* v. *Ins. Co.* 31 Conn. 517; *Longhurst* v. *Ins. Co.* 19 Iowa, 364.

We regard it as well settled by authority, and well supported by reason, that if the applicant correctly states his interest and distinctly asks for an insurance thereon, and the agent of the insurer agrees to comply with his request, and assumes to decide upon the form of the policy to be written for that purpose, and by mistake of law adopts the wrong form, a court of equity will reform the instrument so as to make it insurance upon the interest named. Such a doctrine is eminently just and equitable, since the insurance company always prepares the contract, and inserts therein its own terms.

It remains to be determined whether the policy as reformed has been broken. It provides that "if the property be sold or transferred, or upon the passing or entry of a

decree of foreclosure, or upon a sale under a deed of trust, . . . or any change take place in title or possession, . . whether by legal process, or judicial decree, or voluntary transfer or conveyance, . . . in every such case this policy is void." It appears that complainant has foreclosed his mortgage upon the property insured, having obtained a decree for that purpose in October, 1879, in one of the courts of Missouri, and in April, 1880, he bought in the premises under a special execution issued thereon and took possession as such purchaser. At the time of the fire his tenants were in possession.

It is now insisted that this foreclosure and sale, and complainant's purchase and entering into possession, defeat the policy, because there was a decree of foreclosure, and a change of title and possession. Provisions in insurance policies substantially the same as the one above quoted have frequently been the subject of judicial consideration, and they have generally, if not uniformly, been held to provide against a diminution of the interest of the assured and not against its increase.

Thus, in *Heaton* v. *Ins. Co.* 7 R. I. 503, where the policy was for the insurance of a mortgagee's interest, and provided that "if the said property shall be sold or conveyed this policy shall be null and void," it was held to refer to such a sale or conveyance by the assured, determining his interest in the subject of insurance, and not to a sale or conveyance to him, to the increase of his interest in it. And see *Lockwood* v. *Ins. Co.* 47 Conn. 564; *Inbush* v. *Ins. Co.* 4 Ins. L. J. 545.

The policy, being upon the interest of the mortgagee, is not affected by any alienation by the owner of the fee, for the reason that it is a distinct and independent contract for indemnity between the mortgagee and the insurance company. *Foster* v. *Ins. Co.* 2 Gray, 216.

In the case of *Humphrey* v. *Ins. Co.* 15 Blatchf. 504, the terms of the condition respecting alienation were in substance

the same as in the policy now under consideration, and it was held that as the contract was with the mortgagee for the insurance of his interest, no alienation by another person, of the property in respect of which the insurance is effected, can affect or prejudice his rights. And see Wood on Fire Ins. 863, where the same rule is laid down.

The purpose of the provision in question is to require the assured to retain his interest in the property, and it has been construed to mean that if at the time of the fire he has no interest he cannot recover. Wood on Fire Ins. § 325, p. 552; 4 Wait's Act. & Def. 51.

At all events, it seems clear, both upon reason and authority, that a change of title which increases the interest of the assured, whether the same be by sale under judicial decree or by voluntary conveyance, does not defeat the insurance. This is especially true of a case like the present, where the insurance is upon the interest of a mortgagee. In such a case the parties must have contemplated the possibility, at least, that the mortgage would be foreclosed, and the full title and right of possession pass to the mortgagee. The defendant was bound to expect that complainant would foreclose his mortgage if his debt was not paid at maturity. It must be remembered that the foreclosure, sale and change of title and possession complained of, are the necessary result of the proceedings to enforce the very mortgage which complainant held upon the property when he applied for the insurance, and that it was for the purpose of insuring his interest under it that he applied for and obtained the policy now in question. Of course, under such circumstances, the defendant must be charged with notice of the mortgage, and with a knowledge of the fact that the foreclosure sale and consequent change of title and possession was to be anticipated.

If this is not so, then we are obliged to assume that defendant was justified in believing that the complainant, when he insured his interest as mortgagee, did not intend to

assert his rights under the mortgage. What we have said applies also to the change of possession against which the policy provides. It does not mean such a change of possession as would result from the enforcement according to law of the mortgage which complainant held upon the property at the time of the insurance, and of which the defendant had full notice. When the complainant applied to defendant for insurance upon his interest as mortgagee, and the defendant after investigation accepted the risk, it is not too much to say that defendant contracted with full knowledge that complainant had a right under his mortgage to foreclose, if the debt was not paid at maturity; to sell the premises under special execution after obtaining decree of foreclosure; to buy the premises at such sale and to take possession as such purchaser. And defendant was bound to know that none of these rights given by the mortgagee were waived by taking out the policy of insurance. It follows that the several provisions above quoted, respecting change of title and possession, refer to some change other than that which would necessarily follow from the enforcement of the complainant's well known rights under the mortgage. If this were not so, the complainant in every such case would be reduced to the necessity of deciding between a waiver of his rights as mortgagee and the abandonment of his rights as policy-holder. This view is the only one that is entirely consonant with equity.

The defendant received complainant's money and has kept it, and ought to comply with its contract.

Decree for complainant.

NOTE.— 1. The power of a court of equity to reform written instruments upon the ground of mistake is indisputable. Equity will correct errors, but of course cannot make new contracts. *Casaday* v. *Woodbury*, 13 Iowa, 113. Hence a contract must have been made, and by a *mutual* mistake of the parties incorrectly reduced to writing. *Lanier* v. *Wyman*, 5 Rob. (N. Y.) 147; *Sutherland* v. *Sutherland*, 69 Ill. 481; *Evarts* v. *Steger*, 5 Oreg. 147; Wood on Fire Ins. 800, and cases.

It has been asserted that a mistake of law is not ordinarily a ground for relief in equity. *Mellish* v. *Robertson*, 25 Vt. 603; *Lyon* v. *Sanders*, 23 Miss. 530; *Shafer* v. *Davis*, 13 Ill. 395; *Kenyon* v. *Welby*, 20 Cal. 637; *Hunt* v. *Rousmaniere's Adm'rs*, 1 Pet. 1. But, as stated by one eminent writer, "of late years the disposition of courts and text-writers seems to qualify the propositions by many exceptions, and no little difference of opinion, perhaps, exists as to whether it can now even be asserted as a general rule." Bispham, Principles of Equity, § 187. This author makes the distinction that a mistake as to the general law is irremedial, but that a mistake of law in regard to individual rights may be redressed. Id.; and see *Cooper* v. *Phibbs*, L. R. 3 H. L. 149; S. C. below, 17 Irish Ch. 82. He also states that relief will be granted in equity against mistakes of law in "cases where the law is confessedly doubtful, and one about which ignorance may be well supposed to exist." Id.; and see *Daniell* v. *Sinclair*, L. R. 6 Ap. Cas. 181.

That a mistake of law will be relieved against in equity has been announced by much authority. *In re Saxon Assurance Co.* 2 J. & H. 408; *Broughton* v. *Hutt*, 3 De G. & J. 501; *In re Condin*, L. R. 9 Ch. Ap. 609; *Stone* v. *Godfrey*, 5 De G. M. & G. 90; 1 Story Eq. Jur. §§ 138*e*, 138*f*; *Harney* v. *Charles*, 45 Mo. 157; *Northrop* v. *Graves*, 19 Conn. 548.

Whatever the true rule may be, there can be no question of the doctrine asserted in the principal case, where the representative of the insurance company, a practicing attorney, believes, and induces the insured to believe, that a certain form of policy correctly insures the interest sought to be covered; that such a mistake, whether considered as one of law or as a combined mistake of law and fact, will be speedily corrected in equity and the policy reformed. See cases cited in the opinion, and especially *Snell* v. *Ins. Co.* 98 U. S. 85; also *Knox* v. *Lycoming Ins. Co.* 7 N. W. Rep. (Wis.) 776; *Equitable Ins. Co.* v. *Hearne*, 20 Wall. 494; Wood on Fire Ins. 796 *et seq.*

If the insured have knowledge of the mistake in the policy he should move to reform it at once, before loss, or else his laches will defeat his right. *Graves* v. *Boston Marine Ins. Co.* 2 Cranch, 419; *Paddock* v. *Com. Ins. Co.* 104 Miss. 521; *Thwing* v. *Great Western Ins. Co.* 111 Mass. 110; *Conant* v. *Perkins*, 107 Mass. 79. But the mere possession of the policy as written, for any length of time, does not constitute laches, unless the insured knows that the policy incorrectly describes the contract of insurance. *Snell* v. *Ins. Co.* 98 U. S. 85.

The proceedings to reform may be brought as well after loss as before, and, upon reformation, judgment may be had in the same action for the amount due. See cases cited in the opinion; also Wood on Fire Ins. 809, and cases; *Herbert* v. *Mut. Life Ins. Co.* 15 C. L. J. 93, and cases.

2. It is well settled that a mortgagee has an insurable interest in the

property covered by the mortgage. Wood on Fire Ins. 529; *Holbrook* v. *Am. Ins. Co.* 1 Curt. C. C. 193; *Davis* v. *Quincy, etc. Ins. Co.* 10 Allen (Mass.), 113; *Fox* v. *Phœnix Ins. Co.* 52 Me. 333; *Traders' Ins. Co.* v. *Robert*, 9 Wend. (N. Y.) 404; *Ins. Co.* v. *Updegraff*, 21 Pa. St. 513; *Ins. Co.* v. *Stinson*, 103 U. S. 25; *King* v. *State Mut. Ins. Co.* 7 Cush. 4; *Carpenter* v. *Prov. Wash. Ins. Co.* 16 Pet. 495.

As well stated by an able text-writer: "The right of a mortgagee to insure the premises to the amount of his debt *is the lien given upon the property by the conveyance as security for the payment of the debt*; yet the *insurance* is in no sense *an insurance of the debt*, but of the mortgagee's interest in the property *as security for the debt.*" Wood on Fire Ins. 863; *King* v. *State Mut. Ins. Co.* 7 Cush. 4.

Where a mortgagor insures in his own name, with a provision that the loss be paid to a mortgagee as his interest may appear, the insurance is that of the mortgagor. Making the loss payable to the mortgagee is nothing more nor less than an appointment of the mortgagee by the mortgagor as his agent to collect the money. The effect is the same as an assignment of the policy after loss. Wood on Fire Ins. 863; *Carpenter* v. *Prov. Wash. Ins. Co.* 16 Pet. 495; *King* v. *State Mut. Ins. Co.* 7 Cush. 4.

Many persons may have insurable interests in the same property. Thus the owner of the fee may insure, and so may the mortgagee (Wood on Fire Ins. 529); yet this is in no sense a double insurance, for the simple reason that the insurance is not upon the same interests. Wood on Fire Ins. 862. Therefore, if a mortgagor insure his interest, and there is a provision in the policy to the effect that the policy should become void if there is other insurance, an insurance by a mortgagee of his interest in the same property would not avoid the policy. *Woodbury, etc. Bank* v. *Charter Oak Ins. Co.* 31 Conn. 517; *Nichols* v. *Fayette Ins. Co.* 1 Allen (Mass.), 63; *Foster* v. *Eq. Mut. Ins. Co.* 2 Gray, 216; *Ins. Co.* v. *Stinson*, 103 U. S. 25. So the rule is general that insurance upon the same property by persons holding other and different insurable interests would not constitute additional insurance. *Ætna Ins. Co.* v. *Tyler*, 16 Wend. (N. Y.) 507; *Acer* v. *Merchants' Ins. Co.* 57 Barb. (N. Y.) 68; *Mut. Safety Ins. Co.* v. *Hone*, 2 N. Y. 235; *Wells* v. *Phila. Ins. Co.* 9 Serg. & R. (Pa.) 103. It will be readily seen that the reason upon which this doctrine rests is that, "in order to amount to other insurance, *the interests covered by the policies must be identical.*" Wood on Fire Ins. 597, 862. As decided in the principal case, the same reason exists for the rule there adopted.

Where a policy is conditioned to be void upon a change of title, and it is written in the name of the mortgagor, with a provision that the loss be paid to the mortgagee, it has been seen that the insurance is upon the mortgagor's interest. Hence, if there is a foreclosure of the

mortgagor's interest, or a voluntary transfer of his equity of redemption to the mortgagee, this is such a change of title as avoids the policy, because the interest insured no longer exists. *Bilson* v. *Ins. Co.* 7 Am. Law. Reg. 661; *Fitchburg Sav. Bank* v. *Amazon Ins. Co.* 125 Mass. 431; *Campbell* v. *Hamilton, etc. Ins. Co.* 51 Me. 69; *Lawrence* v. *Holyoke Ins. Co.* 11 Allen (Mass.), 365; Wood on Fire Ins. 863, and cases; 4 Wait's Act. & Def. 51. But if the insurance is upon the mortgagee's interest, then a change of title out of the mortgagor does not avoid the policy, because the interest of the insured is not affected; neither does a purchase by the mortgagee of the mortgagor's interest avoid the policy, for the provision against a change of title is held to mean such a change of title as leaves the insured without an insurable interest, and not to such a change as increases this interest. See authorities cited in the opinion; also *Bragg* v. *N. E. Ins. Co.* 25 N. H. 289. Surely no hardship can result to the insurer from such a doctrine. The contract to insure a certain interest has been made; an increase of the interest does not increase the insurance, but should require all the more care on the part of the assured towards protecting the property. No matter what the change of title is, so long as there remains an insurable interest in the assured the policy is not avoided. *Scanlon* v. *Union, etc. Co.* 4 Biss. 511.

In accordance with this principle it has been held that, even where the assured, during the existence of the policy, sells the property, yet if afterwards, and before the fire, he reacquires the title, the policy is renewed, and in case of loss the company held liable. *Lane* v. *Maine, etc. Co.* 12 Me. 44; *Power* v. *Ocean Ins. Co.* 19 La. Ann. (O. S.) 28; *Worthington* v. *Bearse*, 12 Allen, 382; *Hitchcock* v. *N. W. Ins. Co.* 26 N. Y. 68; *Mackey* v. *Ins. Co.* (U. S. C. C. Dist. Iowa) MSS.

The learned judge who delivered the opinion in the principal case asserted a doctrine the justness of which cannot be well controverted. It was this: That if the company insure the interest of a mortgagee, it must have been anticipated that when the debt secured should become due that there would be a foreclosure and sale if the debt remained unpaid, and therefore a technical defense that the policy had become forfeited by acts which were necessarily anticipated should not be permitted. When it is remembered that the conditions of a policy are usually, if not always, in printed form, it may well be doubted whether such a defense is allowable. If permitted, we would have a state of things aptly described by Chief Justice Ryan in *Appleton Iron Works* v. *Brit. Am. Ins. Co.* 46 Wis. 23. That great jurist said: "If the crafty conditions with which fire insurance companies fence in the rights of the insured, and the subtle arguments which their counsel found upon them, were always to prevail, these corporations would be reduced to the single function of receiving premiums, with little or no risk."

Although the doctrine declared by Judge McCrary is probably the first time it has been presented in a case of that kind, yet principles analogous have been often laid down. Thus, where a policy covers a stock of goods, or materials used in certain lines of business, conditioned that the keeping or use of certain articles shall avoid the policy, yet if the keeping or use of the prohibited article was only as usually kept or used in the line of business of the insured, or as composing part of such a stock as is insured, then such keeping or use would not avoid the policy, for the reason that the insurer must, at the time of issuing the policy, have known or contemplated what goods would be kept or used by the insured as incident to property mentioned in the policy. *Steinback* v. *La Fayette Fire Ins. Co.* 54 N. Y. 98; *Whitmarsh* v. *Conway Ins. Co.* 16 Gray, 359; *Elliott* v. *Hamilton Mut. Ins. Co.* 13 Gray, 139; *Harper* v. *N. Y. Ins. Co.* 22 N. Y. 441; *Harper* v. *Albany Ins. Co.* 17 N. Y. 194; *Franklin Ins. Co.* v. *Updegraff*, 43 Pa. St. 350; *Archer* v. *Merchants', etc. Co.* 43 Mo. 434; *Phœnix Ins. Co.* v. *Taylor*, 5 Minn. 492; Wood on Fire Ins. 368–376. But see *Steinbach* v. *Ins. Co.* 13 Wall. 183. So, where a policy issued on an unoccupied building was conditioned to be void in case it should become vacant, it has been held that if the insurer knew at the time of issuing the policy that the premises were vacant, such knowledge would be a waiver of the condition. *Williams* v. *Niagara Ins. Co.* 50 Iowa, 561. Many other cases might be cited where policies were issued by the insurers with the knowledge that certain conditions had not been complied with, and the courts held that the conditions had been waived, or that the companies were estopped from insisting upon a violation thereof. Wood on Fire Ins. 832–840.

FRANK HAGERMAN.[1]

KEOKUK, IOWA, August 29, 1882.

ST. LOUIS SMELTING AND REFINING COMPANY *v.* GREEN *et al.*

(District of Colorado. June, 1882.)

1. EJECTMENT — PATENT.— In an action of ejectment, a patent for land granted by the United States cannot be collaterally attacked.
2. ESTOPPEL.— *Query:* Does the doctrine of estoppel apply to one who is not the owner of real estate, but only taking steps to so become; as, applying for patent?
3. SAME.— An owner of real estate who stands by and allows improvements to be made thereon, while he may not be permitted to claim

[1] In *Federal Reporter.*

the improvements, will not thereby be estopped to assert title to the fee.

4. SAME — NOTICE.— One making application for patent to mineral land is required by law to put on the premises notice thereof. The courts will presume such notice given; which notice is of itself a warning to all that the parties are about applying for a patent — seeking to obtain title. If one party knows the facts, or has opportunity to know them, and chooses to take his chances, the other party is not estopped.

5. SAME — PROMISE.— A promise to convey title when obtained will not estop the promisor to assert such title by action in ejectment.

MCCRARY, *Circuit Judge (orally).*— This is an action of ejectment, and the record shows, and the defendants by their pleadings admit, that the plaintiff claims under a patent of the United States. Some of the questions in the case have been determined heretofore upon demurrers to former answers. The questions now to be considered arise upon demurrer to the third amended answer. By this pleading the defendants seek to attack, in this action of ejectment, the patent under which the plaintiff claims. They do so upon two grounds, substantially. The answer is quite voluminous, but its allegations may all be summarized under two heads:

First. That the patent was obtained by the patentee, Mr. Starr, under whom the plaintiffs claim, by fraud, conspiracy, bribery and perjury.

Second. Defendants plead, as an estoppel, certain facts, to which I will refer presently.

With regard to the defense that the patent was obtained by fraud, etc., it may be observed that many of the allegations of the answer are too general in their character to be sufficient. It is, of course, not enough to say in general terms, that an instrument has been obtained or procured by fraud, perjury or conspiracy. The pleader must state facts which will enable the court, and not the pleader, to determine whether there is a case of fraud, or conspiracy, or perjury. Still, we are of the opinion that there are, in this

answer, allegations sufficient to call for a reply, if it be true, as claimed by the counsel for defendant, that a patent of the United States in an action of ejectment can be attacked collaterally for fraud. And this makes it necessary to determine that question. It is a question about which the authorities are not in entire harmony. But we are, of course, concluded by the decisions of the supreme court of the United States, and it is, therefore, proper that we should refer to the decisions of that court, and determine whether the question is settled, so far as this court is concerned.

Another action of ejectment, arising upon this identical patent, was brought in this court some time since, and was tried here. The court in that case admitted certain evidence tending to show that the officers of the land department had issued the patent improperly and erroneously. The judgment of the court in that case has been reversed, and an elaborate opinion, pronounced by Mr. Justice Field, is now before us. In that opinion the doctrine is laid down so clearly and emphatically as to leave no room for doubt, that, in an action of ejectment, the defendant cannot be permitted to attack a patent, even upon the ground of fraud. He must resort to a court of equity.

After citing numerous cases in the supreme court of the United States, the opinion in the case just referred to proceeds as follows:

"According to the doctrine thus expressed, and the cases cited in its support — and there are none in conflict with it,— there can be no doubt that the court below erred in admitting the record of the proceedings upon which the patent was issued, in order to impeach its validity. The judgment of the department upon their sufficiency was not, as already stated, open to contestation. If, in issuing a patent, its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, *or even from corrupt motives*, a court of law can afford no remedy to a party alleging that he is thereby ag-

grieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands. *Boggs* v. *Merced Mining Company*, 14 Cal. 363–4. It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied, it can, on its own account, authorize proceedings to vacate the patent or limit its operation."

And proceeding, the court say: "The case at bar, then, is reduced to the question whether the patent to Starr is void on its face; that is, whether, read in the light of existing law, it is seen to be invalid. It does not come within any of the exceptions mentioned in the cases cited. The lands it purports to convey are mineral, and were a part of the public domain. The law of congress had provided for their sale. The proper officers of the land department supervised the proceedings. It bears the signature of the president, or rather of the officer authorized by law to place the president's signature to it — which is the same thing; it is properly countersigned, and the seal of the general land office is attached to it. It is regular on its face, unless some limitation in the law, as to the extent of a mining claim which can be patented, has been disregarded."

Without reading further from that opinion, it is sufficient to say that the doctrine is fully and elaborately discussed, and numerous cases are cited as establishing the doctrine that a patent of the United States, in an action of ejectment, cannot be collaterally attacked.

The cases referred to may be mentioned, although I shall not take the time to read from them or comment upon them: *Pope's Lessees* v. *Wendall*, 9 Cranch, 87; *Patterson* v. *Winn*, 11 Wheat. 380; *Hoofnagle* v. *Anderson*, 7 Wheat. 212; *Boardman* v. *Reed*, 6 Pet. 342; *Bagnell* v. *Broderick*, 13

Pet. 448; *Johnson* v. *Towsley*, 13 Wall. 72; *Moore* v. *Robbins*, 96 U. S. 585.

In the case of *Johnson* v. *Towsley* the doctrine was stated by Mr. Justice Miller in these words (13 Wall. 83): "That the action of the land office, in issuing a patent for any public land subject to sale, by pre-emption or otherwise, is conclusive of the legal title, must be admitted on the principle above stated, and in all courts and in all forms of judicial proceedings where this title must control, either by reason of the limited powers of the court or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand, there has always existed in the courts of equity the power, in certain classes of cases, to inquire into and correct mistakes, injustice and wrong in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and, by virtue of this power, the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown or other executive branch of the government have been corrected, or declared void, or other relief granted."

It is hardly necessary to say that an action of ejectment is pre-eminently an action in which the legal title must prevail, and, therefore, one in which, according to this ruling, the patent cannot be attacked collaterally.

Governed and controlled, therefore, by the decisions of the supreme court of the United States, we are bound to say that so much of this answer as sets up fraud, conspiracy, etc., is bad, and that the demurrer must therefore be sustained.

I come now to the consideration of that part of the answer in which the defendant pleads estoppel. It is somewhat voluminous, but I will state in condensed form the substance, as I understand it, of the pleading.

The answer demurred to, so far as this question of estoppel is concerned, pleads certain facts, which, it is claimed,

should estop plaintiff to recover in this case. Many of these facts tend only to show fraud, and are therefore, under the doctrine already announced, not admissible in this form of action. Eliminating the allegations falling within this description, we have remaining in substance the following:

First. That defendants are owners of and entitled to the possession of the property in controversy, by virtue of prior, adverse and exclusive possession of the same, as part of a town site on the public domain.

Second. That Starr obtained the mining patent, under which plaintiff claims title, for one hundred and sixty-four and sixty-one one-hundredth acres, all of which was included within the town site and city of Leadville.

Third. That said Starr claimed under placer mining claims which had their inception in favor of his grantors in 1860, the claims of Starr himself dating from August, 1877.

Fourth. That, after the inception of these claims, and prior to the issuance of the patent to Starr upon them, the city of Leadville grew to a city of twenty thousand people, and the property greatly increased in value.

Fifth. That, during that time, Starr, the patentee, was living in Leadville and witnessed the improvements that were being made, and the large sums of money being expended by defendants as settlers on the lots now in controversy, and during all said time said Starr and his grantors stood by and kept quiet in regard to his or their ownership of said mining claims, and confederated with certain other parties in interest to stand by and secrete all their claims to ownership and all their efforts to obtain a patent.

Sixth. That plaintiff had an interest in the Starr patent, and by its general manager, August Myers, also stood by and saw the property improved by defendants, and never at any time notified defendants that the plaintiff had made or would make any claim to said land, but, on the contrary, secreted and concealed the same.

Seventh. That said Myers, general agent, and one Har-

rison, the president of plaintiff company, conspired and combined with Starr to secrete and conceal their claims, with the intention of allowing the defendants to go on and spend their money in making valuable improvements, etc.

Eighth. It is, however, admitted that defendants were notified of the application for a patent made by Starr, and it is averred that after defendants found that said application included land situated in said city of Leadville, the said Starr and Myers and Harrison, through their attorney, one Hereford, assured defendants that, in case said patent should be obtained, defendants would not be disturbed or interfered with in their right and possession, and, at most, only a nominal sum would be expected or demanded of defendants, and in no case to exceed $25 per lot, and advised defendants to go on making improvements, and that they did go on, relying upon these assurances, and made valuable improvements, etc.

Ninth. That, after obtaining the patent, plaintiff gave notice that it would claim the full value of the lots.

It will be observed that the plea of estoppel rests upon two separate allegations: The first is, that the plaintiff stood by and saw defendants make improvements upon these lots, and failed to make known to the defendants the fact that they (the plaintiffs) were seeking to obtain a patent for the land upon which defendants were making the improvements.

The principle sought to be invoked, I apprehend, upon this branch of the case is the very familiar rule of the law of estoppel, that if the owner of an estate stands by and sees another erect improvements on the estate in the belief that he has the right to do so, and does not interpose to prevent the work, he will not be permitted to claim said improvements after they are erected.

In the first place, it is extremely doubtful whether that principle of the law can be invoked in a case of this character, for it is not claimed, and cannot be, that at the time these plaintiffs are charged with having stood by and advised

the erection of these improvements, they were the owners of this property; and I have never heard it asserted before that a party who intends to purchase land, or who has applied to the owner for the right to purchase it, stands in the position of ownership within the meaning of this principle, so that he is bound to warn all persons to make no improvements upon such land, at the peril of losing them.

Assuming, however, that for the purposes of this decision the defendants did stand in the relation of owners of this land at the time, I do not think this principle of the law of estoppel can be carried so far as to hold that even the owner of real estate who stands by and sees another make improvements upon it, and makes no objection, is thereby estopped thereafter to claim the title of the real estate; he may be estopped to claim the improvements, but I do not think that he is estopped to claim the title in an action of ejectment.

There is another reason why it is difficult to hold that this doctrine of estoppel can apply to a case like this; the law prescribes the mode and manner by which entries of the public mining lands are to be made, and, among other things, it is provided by section 2335 of the Revised Statutes of the United States, that an applicant for a mineral patent must post a plat of the land and notice of his application for a patent in a conspicuous place on the land embraced in such plat. Now, it must be presumed that this law was complied with, and if so, how can it be said that the parties applying for the patent gave no notice, no warning, to anybody? The very fact of their giving this notice was of itself a warning to all who were upon the land, or were about to erect improvements upon it, that these parties were applying for a patent, and were seeking to obtain the title. Moreover, it is admitted by this answer that they did, in fact, ascertain the fact of this application for a patent. Now, one of the familiar rules with regard to estoppel, which we all understand perfectly, is this: That the party to whom the representations are made must be ignorant of the truth of the

matter about which they are made. If he knows the fact, and chooses to take his chances, the other party is not estopped.

For these reasons, then, we are constrained to hold that the allegation that the plaintiffs and their grantors stood by while these improvements were being made, and made no objection, does not amount to a good plea of estoppel in this action of ejectment.

The other allegation under this head is that, after the defendants were notified and informed of this application for a patent, they had an arrangement with the plaintiff, by which the plaintiff assured them that after obtaining a patent it would sell to them for a nominal price, and would not disturb them in their possession. This is not a good plea of estoppel. It lacks some of the essential elements of such a plea. It alleges an arrangement, understanding or agreement entered into confessedly with full notice on the part of defendants that Starr had applied for a patent, with a view to obtaining title to the land, and by which defendants were to obtain that title from Starr, or plaintiff, after it should be vested in one or both of them. How, then, can it be set up as an estoppel to prevent plaintiffs from recovering that title in ejectment? Defendants did not act in ignorance of the facts, but with notice, relying upon the promise of plaintiffs to convey the title upon certain terms and conditions after obtaining it. If, therefore, the arrangement amounted to anything, it is simply a contract under which, if it be valid and binding, defendants may be entitled to have a remedy. If it be a contract capable of specific performance, it must be in a court of equity. If it be one upon which defendants are entitled to recover damages, the proper action must be brought for that purpose. As the arrangement, whatever it was, clearly contemplated the obtaining of the legal title by plaintiff, it cannot be set up by way of estoppel in the present action.

There is still another branch of the answer, in which there

is a counterclaim, based upon the value of these improvements. Without going much into that, we overrule the demurrer to that part of the answer, and reserve the question as to what the law may be until the evidence shall be produced.

In view of the importance of this case, and of the fact, as we are advised, that it will affect the decision in numerous other cases, we have given such consideration to it as was possible under the circumstances. If we are wrong in any of the conclusions which have been announced, the record will be in good shape for the defendants to present the question to the supreme court, where the whole matter can be reviewed, and, perhaps, in the best possible form for the defendants, being an issue upon demurrer, which will raise all the questions they desire to have determined.

The demurrer to so much of the answer as sets up fraud and estoppel is sustained.

The demurrer to the counterclaim is overruled.

Mr. Green — We will stand by our answer.

The Court — Unless there are some other questions in the other cases, the same order must be entered in all of them.

G. G. Symes, for plaintiff.

T. A. Green, for defendants.

SWANSTON *v.* THE MORNING STAR MINING CO.

(District of Colorado. June, 1882.)

1. ATTORNEY HAS NO LIEN UNLESS GIVEN BY STATUTE.— An attorney has no lien for fee unless conferred by statute, and a party to a suit has an undoubted right to settle his suit without the consent of his attorney.

MCCRARY, *Circuit Judge (orally).*— This is an action to recover damages for a personal injury. Since the institution

of the suit the plaintiff has, without the knowledge of his counsel, settled it, and the following writing has been filed, upon which the court is now asked to dismiss the case:

[Title of case.] "Having received $1,800 from defendant, in full for all claims, demands and causes of action sued for in this case, I hereby authorize and direct the clerk of this court, or the court itself, to dismiss this action at my own cost; and I agree not to further prosecute the same, and that defendant is authorized to file this order of dismissal, or use it as it deems proper." [Signed by plaintiff and sworn to.]

The motion to dismiss upon this agreement is resisted, not by the plaintiff himself, but by his attorneys, who say that they had a contract with the plaintiff, whereby, in the event of their success in this suit, they were to receive as their compensation for services one-third of the amount which might be recovered. The question is made as to whether this is a champertous agreement, but we are not disposed to go into that question. It is one, perhaps, of some difficulty, and about which there is a considerable conflict of authority. It would undoubtedly be champterous if either of the attorneys had agreed to pay the costs of the proceeding; but whether a mere contract for a contingent fee of one-third of the amount recovered is champertous, is a question not entirely settled. We do not think it necessary, at all events, to pass upon it in this case.

It is, perhaps, not improper to remark, however, that it is not a contract which commends itself very much to the favor of the courts, and this court would not be disposed to go any further than the law requires to uphold it. But even assuming that it is a valid contract as between the plaintiff and his attorneys, the question arises, how can we, by any order of ours, continue this case and carry it on to judgment, after the plaintiff himself has sold the cause of action and received a sum which, he says, is in full satisfaction. The attorneys are not parties to the record; no judgment could be rendered in their favor, and, if we were to go on to trial,

I do not see how it is possible that any judgment at all could be rendered upon the record in the face of this dismissal, this acknowledgment of payment in full by the plaintiff himself. If the counsel for the plaintiff had any lien upon anything, the court would protect them, perhaps, by some form of proceeding in this case; that is to say, the counsel might, perhaps, be allowed under your statute to intervene, if you have a statute authorizing such a proceeding as that, and to assert their rights in this suit. But it is very clear that the attorneys of the plaintiff have no lien upon anything in a case of this character. I believe it is well settled that an attorney has no lien even upon a judgment recovered by him for his client in an action, unless the statute gives it. It has never been claimed that an attorney would have a lien upon a claim for unliquidated damages, and there can be no foundation for a lien of any kind or description upon anything in controversy here.

If the attorneys had in their hands a contract, a promissory note, or instrument of any description that could be called property, and had rendered services in prosecuting a suit upon it, perhaps they might, by proper proceeding, be allowed to enforce a claim or lien upon it.

It is enough to say that there is no doubt of the right of the plaintiff to settle the suit without the consent of his attorneys, and that having done so, the controversy must be regarded as at an end, and the suit must be dismissed. If the attorneys have any claim against the parties who have made the settlement, they must assert it in some other mode of proceeding. It is not open for consideration here.

The doctrine I have announced is supported by the case of *Coughlin* v. *Railroad Company*, 71 N. Y. 443, and *Hooper* v. *Welch*, 43 Vt. 269.

D. J. Haynes and *Wells, Smith & Macon*, for plaintiff.

L. C. Rockwell and *J. B. Bissell*, for defendant.

DUNMEAD *v.* THE AMERICAN MINING AND SMELTING COMPANY.

(District of Colorado. July, 1882.)

1. NEGLIGENCE — NECESSARY ALLEGATIONS BY PLAINTIFF. — In an action by a servant for damages caused by the incapacity of a fellow-servant, the plaintiff must allege that the injury was not caused or contributed to by his own negligence; and also that he was not informed of the unfitness of the fellow-servant.

On demurrer.

HALLETT, *District Judge (orally).*— Case number 900 is an action to recover damages for injuries received by the plaintiff from the overturning of a slag-pot. Plaintiff avers that he was in the service of defendant in the month of July last year, and that he was engaged in removing slag-pots from the defendant's furnaces, to be emptied outside of the furnace building; that, through the carelessness of another person, also employed by the defendant to assist in removing these pots, one of the pots was left in a place where it obstructed the passage way, and the plaintiff moving backwards, drawing a slag-pot without the building, fell upon this, or it caused him to fall down, and, as I understand it, the slag-pot which he was attempting to remove was overturned in such a way that it injured his person. He claims that this other man who was employed by the defendant with him was a careless and negligent person, who was not fitted for the service in which he was employed; and that the defendant knew that he was a person of that character; that he was a man of intemperate habits, and had been so in the discharge of his duty before that time, as the defendant knew.

The plaintiff omits to say in his complaint that he himself used due care and caution at the time of this accident. That, I think, is a matter which must appear upon the evidence. While it may be that he is not required to offer any evi-

dence directly to the point that he was in the exercise of care and caution at the time of the accident, it must appear from all the evidence that the fact was so, that is to say, that he himself was not negligent.

He fails to aver, also, that he was not informed of the character of this person who was employed with him. He says nothing upon that subject. He avers that the defendant had information of the unskillfulness and untrustworthiness of this man, but says nothing as to himself. It must appear from the evidence that he was ignorant of the character of this person, because if he knew of his character, knew that he was a person who was unfitted for the service, or had the same means of knowledge as the defendant, it was in his own wrong that he continued in service with such person, unless, indeed, there were some special circumstances, as that complaint had been made and the defendant had promised to dismiss this individual and employ another in his stead; but nothing of that kind is averred. He says nothing whatever as to his own knowledge of the capacity and fitness of this person, who was certainly employed with him in the precise service which the plaintiff was engaged in. He says nothing whatever as to his capacity and fitness. He should state something upon that point as to whether he was informed that the person was unfit for the service in which he was engaged.

On these grounds the demurrer will be sustained.

T. A. Green and *W. W. Cover*, for plaintiff.

Markham, Patterson & Thomas, for defendant.

HYMAN *v.* CHALES and others.
HOPKINS and another *v.* CHALES and others.

(District of Colorado. July, 1882.)

1. MARSHAL — SPECIAL DEPUTIES — OFFICERS DE FACTO.— Where, under the laws of the state, a sheriff may appoint a person to perform a special service, a marshal, under section 788 of the Revised Statutes, has the same authority, and the person so appointed by him is an officer *de facto*, and a person served with process by such appointee cannot dispute his authority on the ground that he had not taken the oath of office, as required by the statute in relation to the appointment of deputies.

On motion to quash marshal's return.

HALLETT, *District Judge.*—In the case of Hyman against Chales and others, and Hopkins and another against Chales and others, defendants move to quash the marshal's return to the summons on the ground that the person who served the summons was specially appointed a deputy to serve it, and that it does not appear that such person had taken the oath of office as required by the statute in relation to the appointment of deputies.

Section 788 of the Revised Statutes provides that marshals and their deputies shall have the same power in executing the laws of the United States as the sheriffs and their deputies in such state may have by law in executing the laws thereof. It appears that under the laws of the state a sheriff may appoint a person to perform a special service, such as serving a particular writ, and no reason is perceived for saying that a marshal under this section may not have the same authority. Upon general principles, however, if the marshal may appoint deputies to perform all services, he may appoint one to perform a particular service; and whether that person has taken the oath of office as prescribed is not a question for the person who may be affected by the duty to be performed. It may be a question which can be raised by

the marshal himself as to whether the deputy is properly in his place, but as to the service which he has to perform he is an officer *de facto*, if no more. It does not lie with the person who may be summoned to dispute his authority, for that reason.

AMERICAN WINE CO. *v.* BRASHER BROS.

(District of Colorado, July, 1882.)

1. ISSUE — MATERIALITY OF. — In the matter of the sale of wine to a merchant or dealer, an issue joined as to the correctness of a representation by the seller to the purchaser that there was a demand for the article, and that it was salable in the country embraced in his trade, is a material issue, upon which a jury may find the facts.
2. SAME — SAME — WAIVER. — Where the issue tendered by the answer is of a doubtful character, but is joined by the plaintiff, the latter waives the right to raise the question of the materiality of the issue — especially after verdict, upon a motion for a new trial.
3. RESCISSION — WHEN CONTRACT INDUCED BY FRAUD. — When the contract has been induced by fraud, it is not necessary that the party seeking to rescind it should absolutely tender what he has received under it. It *is* necessary that he should give notice of his intention to rescind, and that upon the trial he should be in a situation to put the other party in the situation in which he was at the time of the discovery of the fraud. That the contract is partly executed at the time of the discovery of the fraud, will not, in itself, prevent a rescission, unless the greater part of the subject matter thereof has been disposed of.

Ruling on motion for new trial.

HALLETT, *District Judge (orally).* — The American Wine Company, a corporation doing business in St. Louis, Missouri, brought suit against Brasher Brothers, a firm of this city, upon an accepted draft of $1,360. The defendants in their answer admitted the execution of the draft, and averred that it was given upon the sale to them of a hundred cases of wine; in that sale certain misrepresentations were made by the agent of the plaintiff as to the quality of the wine and

the demand for it in this state and in the territory of New Mexico; the agent of the plaintiff represented that the wine was as good as foreign champagnes, which was untrue, and also that it was well known to the trade of this state and in New Mexico, and that there was a large trade for the wine in this region of country, and that also was untrue. A great many matters were set up in the answer relating to the negotiation between the parties, and correspondence between them; what took place between them from time to time in reference to this purchase; and the plaintiff made a motion to strike out some parts of the answer as irrelevant and immaterial, and that motion was sustained as to all excepting one clause of the answer, and that clause reads as follows:

"These defendants aver that, after they received the said one hundred cases of said wine, they advertised the same extensively in the newspapers of the state of Colorado, and by circulars and traveling agents, stating that they were the sole and exclusive agents for the sale of said wine, at great expense, to wit, the expense of $600."

The answer set up that it was a part of the contract between these parties that the defendants were to make an effort to sell this wine, "to push it," as they expressed it, and this clause was stating one of the efforts which they made in fulfilment of their agreement.

The motion was overruled as to that clause, but otherwise sustained, so that all objections which were made to the answer, except as to this clause which I have mentioned, were sustained. I state this to show that the plaintiff accepted the issues that were taken as to the quality of this wine, and as to the trade which existed for it in this country.

The cause was tried before a jury last year. That jury disagreed, and were discharged when they found that they were unable to agree. At this term the cause came on for trial upon the same issues, nothing being said as to their materiality; but when we came to the trial, and a jury was impaneled and in the box, objection was made that the

issues were immaterial. That objection was overruled, and parties proceeded with their evidence. The case was submitted to the jury upon the evidence. They found a verdict for the defendants, assessing damages against the plaintiff in the sum of $323. The objection that these issues were not material is renewed by motion for a new trial. That is the matter which we have under consideration at this time.

As to the principal question, one upon which most of the testimony was offered, and which was decisive of the whole matter, I have no doubt that it was a material issue, to be determined by the jury upon the trial of the case, whether there was a trade existing in this country at the time of the sale; whether the agent of the plaintiff represented that there was such trade. It seems to me there can be no question that that was a material matter, and had some influence on the parties in making the contract. This wine was bought for sale. Defendants were merchants or traders, and they bought this to be sold again, as the agent of the plaintiff well knew; and whether there was any demand for it in the country was a very material matter for consideration. In purchasing this quantity of wine (I should have said that the contract was for a car-load of wine — it was to be delivered in lots of one hundred cases each, and this was the first instalment of the entire quantity), the defendants were new in the business here. They had recently come here from Canon City, where they had for some time carried on business, but in a much smaller way than they proposed to conduct it here, and, in their purchase of so large a quantity of this merchandise, it was certainly an important question for them what disposition they could make of it; whether they could find sale for it.

As to the other question, as to the quality of the wine, there is really very considerable room for doubt whether, as matter of law, a man who deals in wine shall be allowed to say that he does not know its quality, as compared with other wines in the market. It is a matter which can be tested by

the use of the article, and apparently by a very little use of it. I say, as an original question, that would be very doubtful; and, upon the evidence here, many witnesses testified that this wine was of good quality for American wine; and others that it was not. I should say that there is room for doubt whether it is an issue that ought to be submitted to the jury upon a question of fraud and deceit in respect to the sale of the article. But it must be remembered that the plaintiff accepted this issue without objection when it was tendered to him. He made no objection whatever to that part of the answer; he made objection, as I have stated, to some other parts — the correspondence between parties — what took place between them; but as to this part of the answer he said nothing, and accepted it; replied to it. He not only accepted it then, but throughout one trial, and after we had had a jury to disagree upon the question, which occasioned considerable expense to the parties and the government in respect to the trial, and up to the time of another trial, and after the jury was impaneled for another trial. Upon that I think it ought to be said, that although it is a matter of some doubt whether it is a question that ought to be ruled against the defendants, as matter of law, that the plaintiff has waived any right it had to raise the question in this form and at this time. Upon that I have not discovered anything in the authorities or reports which is directly in point; but there is here something that is said by the supreme court of Wisconsin in respect to a doubtful averment in a complaint (*Potter* v. *Taggart*, 11 N. W. Rep. 678):

"The learned counsel for the respondent insists — *first*, that the complaint does not show that the appellant was injured by the alleged fraudulent representations and concealment of the respondent, and so fails to state any reason for a rescission of the contract; and *second*, that it fails to show that he has returned, or offered to return, the note and mortgage to the respondent before the action was commenced, and, in

that respect, he fails to show himself in a position to demand his purchase money back.

"We are inclined to hold that, after answer, upon an objection for the first time to its sufficiency, the complaint is sufficient in both respects. In the case of *Hazelton* v. *Union Bank*, 32 Wis. 34–43, Justice Lyon, in delivering the opinion, says:

"'The rule is well settled that a greater latitude of presumption may be indulged in to sustain a complaint where the objection that it does not state a cause of action is taken for the first time at the trial, and after an issue of fact has been taken upon it by answer, than where the same objection is taken by demurrer.'

"The same rule was stated in *Teetshorn* v. *Hull*, 30 Wis. 162–167; *Hamlin* v. *Haight*, 32 Wis. 238–242; *Luth. Ev. Church* v. *Gristgau*, 34 Wis. 328; *Johnson* v. *Ashland Lumber Co.* 45 Wis. 119; *Johannes* v. *Youngs*, id. 448; *Wiltman* v. *Watry*, id. 493.

"Under the rule established by the cases cited, we think the complaint sufficiently alleges that the respondent was guilty of making either a fraudulent representation or a fraudulent concealment of the fact that a part of the property described in the mortgage had been released before the date of the sale, and that such fraud was injurious to the appellant."

The court then go on to discuss the question of fraud, as alleged. I think what is said there is applicable to a case of this kind where an issue is tendered of a doubtful character, and parties come to say after trial that there is an immaterial issue.

The more difficult question presented in the case, and which I believe was fully presented at this trial, if not at the other, is whether the defendants were in a position to rescind the contract, and object to the payment of the draft which they gave for the wine at the time that they attempted to rescind. They gave notice of their intention to rescind the

contract in the last days of October, 1880, the draft having been drawn on the twenty-ninth day of June; precisely when it was accepted does not appear; but the notice of their intention to rescind was given nearly four months after the acceptance of the draft, and at that time they had sold some twenty cases of the wine. In their letter they said nothing about the sale of the twenty cases, stating that they held the wine subject to the order of the plaintiff. Upon the letter it might be assumed that they held all of the wine still in their possession, and were also ready to turn it over to the plaintiff and resist the payment of the draft, on the ground that they were misled at the time of making the purchase of plaintiff's agent in respect to the matters which I have stated. It is contended that, having sold a part of the wine, they had no right then to rescind the contract; the situation of the parties was so changed that they could not put the plaintiff in the condition in which it was at the time the draft was given, and, therefore, there could be no rescission of the contract; that whatever remedy defendants have must be by way of diminishing the damages in an action for the value of the wine. And there are many cases which state the proposition in general terms, that, in order to rescind, the other party must be put in the same situation in which he was at the time of entering into the contract; that the party offering to rescind must restore whatever he has received under the contract, and, if he is not in a situation to do that, he cannot rescind at all. One case in the 75th Illinois Reports is very much in point on that subject. *Wolf v. Deitzsch*, 75 Ill. 206. The defendant there ordered eighty-one gallons of Affenthaler red wine, the quality to be good; the price agreed upon was $2.50 per gallon; the defense set up that, when received, it was not good, but very sour, and wholly unsalable as wine. Some twenty gallons of the wine were sold by appellee, and for the value of this the judgment was for appellants; but for the value of the residue the judgment was against them.

The court go on to discuss the question as to the quality of this wine, and its condition at the time it was shipped to the defendant. They arrive at the conclusion that the weight of evidence is to the effect that the wine was according to the contract; in fact, several witnesses testified that it was of that quality, while the defendant himself testified it was not good wine; that it was in bad condition when received. But the conclusion of the court evidently is that the plaintiffs in the suit complied with their contract. They then go on to say that —

"On appellee's own evidence, however, the law is against him, and the instructions ought not to have been given without modification. The doctrine repeatedly announced by this court is, that a party cannot affirm a contract in part, and rescind it as to the residue. If he rescind he must do so *in toto*. He must put the opposite party in as good a condition as he was before the sale, by a return of the property purchased, unless it is entirely worthless. And, where a vendee has a right to object that goods delivered are different in quality from those he purchased, he must do so within a reasonable time, and before exercising acts of ownership over them. If, before objecting to their quality, he exercises any act of ownership over them, as by selling a part, etc., he cannot afterwards repudiate the contract, so as to wholly defeat the vendor's claim for the price."

In that case it is obvious that, from the nature of the objection that the wine was of inferior quality and in bad condition when received, that the defendant ought to have discovered it as soon as he opened it, and that his act in disposing of some of it after he must have had knowledge of its quality, was in affirmance of the contract, so that the general rule, as stated by the court, was directly applicable to the facts as presented.

In this I think the facts are somewhat different. Here the misrepresentation is alleged to have occurred in respect to the demand for the wine in Colorado and in New Mexico,

and that is a matter which could only be determined by experience. Defendants could not know whether there was a demand for this wine until they should for some time make some effort to sell. This certainly required some time. They could not discover that within a day or week, or perhaps a month, after they took the wine from the plaintiff. That point was submitted to the jury directly; they were told that defendants must rescind as soon as they discovered that they had been imposed upon, and it was a question for them to consider whether they had acted in time in this instance. In returning a verdict for the defendant, the jury must have decided upon the evidence that the notice was given in season. In support of the verdict of the jury, and to the effect that the plaintiffs were not precluded from rescinding the contract by having dealt with the wine, and having disposed of some of it, the defendants cite 2 Parsons on Contracts, on page 780. He says that:

"Where the right to rescind springs from discovered fraud, there is an exception to the rule: the defrauded party does not lose his right to rescind because the contract has been partly executed, and the parties cannot be fully restored to their former position."

The authorities cited do not bear him out. I have examined all of them. In my judgment none of them support this conclusion. That is not an extraordinary thing with this author; but it seems that some courts have accepted the proposition as stated.

In *Hendrickson v. Hendrickson*, 51 Iowa, a defendant asked the court to instruct the jury as follows:

"If you find from the evidence that the defendant, as part of the purchase price of the team, paid a debt due from the plaintiff, and $58 money due from her husband's estate, for which the same was liable, then the plaintiff cannot rescind the contract and reclaim the property, without placing the defendant in the same position he was before the trade was made, by repaying or offering to repay the money paid out

by him, unless the defendant was guilty of some fraud practiced upon her, and you should find for the defendant; but if you find he practiced fraud, she can recover without tendering what she received from him."

The court say that this instruction was supported by Mr. Parsons' view of the law, and that it ought to have been given.

"The foregoing instruction is in strict accord with this authority. It should, therefore, have been given."

Whether they would have declared it to be a correct statement of the law if the instruction had come from the other side, may be somewhat doubtful. It will be observed that the defendant was stating the law against himself, and stating it very strongly, and the court refused to give it as he stated it. The supreme court say the court ought to have complied with his request; but at all events the court seems to have accepted Mr. Parsons' view of the law, and gone a little further than he does, for, as the proposition is there given, it is to the effect that one who has been defrauded is under no obligation whatever to make restitution of what he has taken, and Mr. Parsons does not state the proposition so strongly as that.

In another case, in the 32d Vermont, the proposition is stated apparently with some care in this way:

"But a *defrauded party* does not lose his right to rescind because the contract has been in part executed, and the parties cannot be fully restored to their former position, but he must rescind as soon as the circumstances will permit."

That is the proposition as Mr. Parsons states it, I believe.

In this Wisconsin case, which is a very late one — decided in March of this year, — the proposition is stated somewhat differently, and here the facts were very much controverted. The authorities are extensively reviewed. It is evident that the subject received a good deal of attention.

"The rule as to the rescission of contracts, stated by Leake in his Digest of the Law of Contracts, is as follows:

"'The fact that the contract was induced by fraud gives

the party defrauded the right, on discovering the fraud, to elect whether he will continue to treat the contract as binding, or avoid it; but the contract continues valid until he has determined his election by avoiding it.'

"'He must determine his election to rescind by express words to that effect, or by some unequivocal act, under circumstances which render such words or act binding.'

"The complaint in this action states that, as soon as the appellant ascertained that he had been defrauded in the purchase of the note and mortgage, he immediately went to the respondent, 'for the purpose of demanding of him a return of the $403.91 so paid by the appellant to the respondent, and to return to him the said note and mortgage; but the respondent then and there refused to do anything in regard to the matter, and then and there refused, and still does refuse, to return to plaintiff said sum, or any part thereof.' It is true this allegation does not state in express words that the appellant offered to return the note and mortgage to the respondent; but we think it is fairly to be inferred, from the language used, that he did make such offer. He says he went to the respondent for the purpose of making such offer, and to demand his money back, and that the respondent refused to do anything in regard to the matter, and 'then and there refused, and still does refuse, to return the money, or any part thereof.' The refusal of the respondent to do anything about the matter, and to return the money, or any part thereof, clearly implies that he was requested by the appellant to do something about it, and to return the money.

"In order to rescind a contract by a purchaser when a ground for rescission exists, it is not necessary to make any formal tender of the property held by the purchaser; it is sufficient to make return of the same (see *Van Trott* v. *Wiese*, 36 Wis. 439–448; *Mann* v. *Stowell*, 3 Pin. 220); and if the vendor refuses to receive the property back and return the purchase money, or do anything except to keep what he has, no formal tender of the property is necessary. The right of

the vendor to have the property formally tendered is waived by his refusal to accept it in advance.

"In *Wright* v. *Young*, 6 Wis. 127, this court say:

"'In this case the appellant has, from the outset, resisted the performance of the contract, and insisted that it was not binding on him. Any tender to him while occupying this ground of defense would have been an idle ceremony.'

"So, in the case at bar, the respondent insists that the appellant has no right to rescind the contract, and refuses to return the purchase money, or any part thereof. By taking that position, he relieves the appellant from making any formal tender of the note and mortgage. The appellant has done all that is necessary to maintain his action when he shows that he has offered to return what he had received upon the contract, and that the respondent had refused to receive it and return the purchase money. The following cases hold the same rule: *Bank* v. *Keep*, 13 Wis. 209–214; *Corbitt* v. *Stonemetz*, 15 Wis. 170–172; *Mc Williams* v. *Brookins*, 39 Wis. 334; *Cunningham* v. *Brown*, 44 Wis. 72.

"If the vendor in such case is ready to rescind on his part, then it becomes necessary for the purchaser to tender and return to the vendor all he has received under the contract. When the vendor refuses to do anything in the matter, and the vendee brings his action to recover the purchase price, he must prove on the trial that he is in a condition to restore to the vendor what he received upon the contract, and should make restoration upon the trial."

The principle, I think, of that case, and of the other one in Vermont, and of many cases which I have examined, is, that in case of fraud, where the contract has been induced by fraud, that it is not necessary that the party seeking to rescind the contract should absolutely tender what he has received on account of the contract. It *is* necessary that he should give notice of his intention to rescind, that he will not abide by the contract, and it *is* necessary that upon the trial he should be in a situation to put the other party in the

situation in which he was at the time of the discovery of the fraud. That the contract is partly executed at the time of the discovery of the fraud will not in itself prevent a rescission, unless it may be that it has gone so far that the subject matter of the contract has disappeared, or the greater part of it. To illustrate that matter: if these parties had sold all, or nearly all, of the wine, there could be no question about it; but having sold but a small part, as relates to the entire quantity which they were to purchase, which was a car-load, I think, by that act, the act being within the contemplation of the parties at the time they made the contract, they will not be precluded from rescinding it, and the circumstance that, at the time of notifying the plaintiff of their intention to rescind, they did not state to plaintiff that they had sold a portion of this wine, is not controlling; they did express the intention to rescind the contract, and if now they can put the plaintiff in substantially the position he then held, I think they ought to be allowed to rescind.

Now as to the money which was received for this wine, nothing was said about it at the trial. It was not mentioned to the jury in the charge which was given then, and it is fair to assume that it escaped the attention of counsel also — that they were so intent upon maintaining the principal issue, to recover the full amount of this draft, they gave no attention to this subject of the sale of the wine. If my attention had been called to it, I should have asked the jury to allow upon the damages which they found for the defendants, if they found any, the value of this wine, but nothing was said to them upon the subject, and the presumption is that they made no allowance whatever for it.

But the matter is not beyond control. If they did not allow for it, we may do so at this time. The value of that wine can be easily ascertained, and it is competent now to deduct it from the amount returned by the jury. The jury have said in their verdict, with more than usual particularity, "we assess the damages, including freight and storage, to the

amount of $323;" under the charge which was given them, as those were the matters submitted to them, and they were advised with reference to the expenditures of defendants for advertisements in their effort to sell this wine, that they were so indefinite, so difficult to be determined, that they could make no account of them, I have not a doubt that the verdict was for these two items, the storage and the freight. The freight amounted, I believe, to something like $214. I think the value of the wine which was sold, to be ascertained probably at the rate of $13.60 per case, as that was the rate at which it was all sold, is to be deducted from the allowance of the jury — that is, if the defendants assent to that, and on that the motion for new trial will be overruled.

There were some other questions presented, as that one witness was absent at the time of the trial, and some other matters which I do not clearly recall, but I think them unworthy of attention, and have no disposition to comment upon them. If the defendants will deduct from the amount of their damages whatever these twenty cases of wine come to, I shall be inclined to enter judgment upon the verdict.

Defendants remitted $272 from the damages returned by the jury, and judgment was entered on the verdict.

J. W. Horner and *J. A. Bentley*, for plaintiff.

Charles & Dillon, for defendants.

Shippen *v.* Tankersley.

(District of Colorado. June, 1882.)

1. Actions Ex Contractu and Ex Delicto.— The distinction between actions founded in contract and those founded in tort is clearly defined. If the cause of action is a wrong with a resulting injury, the action is *ex delicto*. In cases of tort dependent upon contract, the rule is that the action may be either *ex contractu* — for the breach of the contract, or *ex delicto* — for the breach of duty.

2. SAME.—A complaint which alleges that defendant agreed to sell and deliver certain bonds of the county of Clark and state of Arkansas, for $8,000, but instead thereof fraudulently pretended to comply with his agreement by delivering forged and worthless semblances of such bonds, is sufficient to constitute an action in tort.
3. STATUTE OF LIMITATIONS.—The statute of Colorado (sec. 1686, Gen. Laws) which limits the cause of action to two years where the cause of action arose without the state upon contract or agreement, express or implied, does not apply to actions *ex delicto*. Such actions may be brought within six years.

On demurrer to answer.

MCCRARY, *Circuit Judge.*—This case is before the court on demurrer to the second paragraph of defendants' answer to the amended complaint, which raises the question whether the cause of action is barred by the provisions of section 1686 of the General Laws of Colorado. That section is as follows:

"It shall be lawful for any person against whom any action shall be commenced in any court of this state where the cause of action accrued without the state upon contract or agreement, express or implied, more than two years before the commencement of the action, . . . to plead the same and give the same in bar of the plaintiff's right of action."

That the cause of action sued on in this case accrued without the state, and more than two years before the commencement of the action, is admitted. The question is, whether it is a cause of action accruing "upon a contract express or implied." In order to determine this question it is necessary to examine the allegations of the complaint and amended complaint, and to determine therefrom whether the action is *ex contractu* or *ex delicto*. The substance of the original complaint is, that the defendant agreed to sell and deliver to plaintiff, for $8,000 paid, certain bonds of the county of Clark, in the state of Arkansas, but instead of delivering such bonds he fraudulently pretended to comply with his

said agreement by delivering to plaintiff certain printed and written sheets of paper having the semblance of and purporting on their face to be such bonds, which papers defendant falsely and fraudulently warranted to be the genuine and sealed bonds of said county, and plaintiff, relying upon such representation and warranty, accepted said bonds, believing them to be genuine. It is further alleged that said county never received any consideration to authorize the issuance of said obligations, and that said bonds were fraudulently and secretly made, executed and uttered outside of the state of Arkansas long subsequent to their ostensible dates by persons pretending to act as officers of the county of Clark, when they did not hold such offices in fact or in law, and said bonds were by said persons fraudulently antedated. That the bonds were sealed with fraudulent and fictitious seals, manufactured and procured for such purpose; that said bonds had been materially altered at the special instance and procurement of the defendant; that said pretended bonds were not duly registered according to law, and that defendant induced and procured what purported to be a registration, by false and fraudulent means. That by reason of these facts the pretended bonds were false and spurious forgeries. That defendant knew all the foregoing facts at the time of the sale and delivery to plaintiff.

The amended complaint charges more in detail the forgery and fraud relied upon.

The distinction between actions founded in contract and those founded in tort is, in general, very clearly defined. If the cause of action is a wrong with a resulting injury, the action is *ex delicto*. It can scarcely be doubted that the sale of forged bonds, with a knowledge of the forgery, is a tort, and that a suit to recover the consideration paid may properly be maintained as an action in tort.

It is insisted that the complaint shows a tort dependent upon contract, and that therefore the action must be *ex contractu*. The rule is, however, in such cases, that the action

may be either *ex contractu*, for the breach of contract; or *ex delicto*, for the breach of duty. Addison on Torts, sec. 27. If, therefore, it be conceded that this is a case of tort dependent upon contract, the action is not barred, if the complaint states a case in tort, and we think it does. The allegations that the pretended bonds were false, fraudulent and forged, and that the defendant well knew that such was the fact when he sold them to plaintiff, constitute the main cause of action as set out in the original complaint, the other allegations being evidently introduced rather as inducement or as part of the history of the transaction. At all events, the original complaint does contain in substance the averments necessary to constitute an action for the tort, and if it be true that the form of the pleading was objectionable, in that it contained other allegations sounding in contract, it is clear that this circumstance cannot avail the defendant.

The original complaint, considered as a complaint in an action *ex delicto*, was sufficient to stop the running of the statute of limitations from the time of its filing, and it has since been perfected as to form by the amended complaint.

In *Elgee's Adm'r* v. *Dovell*, Woolworth, 102, a suit in detinue to recover two hundred and seventy-five bales of cotton unlawfully seized by the defendant was held to be an action in tort. It was said in that case by Mr. Justice Miller that there are authorities holding that the action of detinue is sometimes treated as an action on contract, and he added that "the allegations of the declaration set out in words a contract of bailment." He said, however, that such actions are often brought in tort, and continued: "We think it would be straining the technical point beyond its just use to hold the plaintiff to the literal words of his declaration." He further said:

"It being clear, from all that appears in this case, that the suit is grounded on a tortious seizure by the defendant of the property mentioned, we will not hold, on this demurrer, contrary to the fact that the plaintiff has sued on a contract, be-

cause, by the forms of pleading, he has been compelled to use a fictitious form."

This ruling fully commends itself to our judgment, and it applies with peculiar force to this case. We can plainly see, from the allegations of the complaint, and assuming their truth, that the present suit is grounded on the tortious acts of the defendant, and we are asked, upon consideration of this demurrer, to shut our eyes to this fact, because some of the allegations of the original complaint are such as might be employed in declaring upon an implied contract. And we are asked to do this for the purpose of enabling the defendant to plead the bar of the statute of limitations — a defense not to be specially favored by the courts.

We hold that the section above quoted does not apply to the present action.

There has been some discussion of the question, what provision of the statute of limitations does apply; but we are clearly of the opinion that the case falls within the actions described in the subdivision of sec. 1671, to wit: "All other actions on the case, except actions for slanderous words and for libels," and may therefore be brought within six years.

Although the statute of this state has abolished the distinctions of the common law as to the forms of actions, yet the words "actions on the case," as used in this statute, must have a meaning, and we understand them to refer to the nature of the action as it existed at common law, and not merely to the form. It requires that, with some exceptions, all actions which, at common law, would have been actions on the case shall be brought within six years.

The demurrer to the said second paragraph of the answer to the amended complaint is sustained.

The same order will be made in the case of *Shippen* v. *Bowen*, where the same questions arise.

Harman & Ellis, for plaintiff.

Youley, for defendant.

HARRISON *v.* THE ARKANSAS VALLEY RAILWAY CO. *et al.*

(Eastern District of Missouri. September, 1882.)

1. CORPORATION — SALE OF STOCK BELOW PAR. — A corporation may dispose of its stock for less than its face value, and the transaction, as between the corporation and the purchaser, will be valid, unless prohibited by statute, and there is no such prohibition in Colorado.
2. STOCKHOLDERS — CONTRIBUTION — PRACTICE. — Where the plaintiff in a suit against one corporation was a stockholder in another, and in the latter capacity, with other stockholders, liable to contribute to the defendant in case the defendant pays the debt: *Held*, no decree for contribution could be rendered against the plaintiff alone in the present suit, for want of proper parties and appropriate pleadings, and that defendants may be decreed to pay the debt to plaintiff and then institute proceedings against plaintiff and other stockholders to enforce contribution.
3. CORPORATIONS — CONSOLIDATION OF SEVERAL — LIABILITY OF CONSOLIDATED COMPANY. — Where several corporations are united in one, and the property of the old companies vested in the new, the latter is liable in equity for the debts of the former, at least to the extent of the property received from them, and if it is also liable at law, the latter remedy is not exclusive.

In equity.

The plaintiff Harrison is the holder of twenty bonds of the Arkansas Valley Railway Company, guarantied by the Kansas Pacific Railway Company, on which he brought his action at law in this court to recover judgment against the Union Pacific Railway Company, alleging that the latter company is responsible upon said bonds as successor in liability under a contract of consolidation between said two last named companies, and certain statutory provisions concerning the same. The said railway companies brought their bill in equity to enjoin the plaintiff Harrison from further prosecuting his action and from negotiating said bonds, and also asking for an accounting between Harrison and the Arkansas Valley Railway Company for interest paid by said company to Harrison as well as for a surrender of the bonds so guarantied, and of two Clay county bonds alleged to be held by

him. The plaintiff Harrison filed a cross-bill, praying alternate relief as follows:

First. If the court holds that the Union Pacific Railway Company is liable directly to Harrison, that the injunction be dissolved and he be permitted to proceed with his action.

Second. If, on the other hand, the court holds that the company is liable only to the extent of the property received from the Kansas Pacific Railway Company, then that the trust be fastened on that property, and for a discovery as to its character, identity and present value.

The material facts with respect to the twenty bonds sued on are as follows:

First. In 1873 the Arkansas Valley Railway Company was a corporation existing under the laws of Colorado, and had authority to construct a railroad commencing on the line of the Kansas Pacific Railway at Kit Carson and extending to Pueblo.

Second. The construction of this line was regarded as of great importance to the prosperity and success of the Kansas Pacific Railway Company, to whose line it would become a feeder.

Third. In order to accomplish this object, bonds were issued by the Arkansas Valley Railway Company, and guarantied by the Kansas Pacific Railway Company, and it was agreed by the former company that anyone subscribing to the scheme $7,500 should receive $10,000 first mortgage bonds of the Arkansas Valley Railway Company, guarantied by the Kansas Pacific Company, $1,000 of Clay county municipal bonds, and stock of the Arkansas Valley Railway Company $7,500, amounting to $18,500 nominal value, in consideration of a cash payment of $7,500.

Fourth. Harrison then being a director in the Kansas Pacific Railway Company, and that company being a stockholder in the Arkansas Valley Company, subscribed to the scheme $15,000, and accordingly became entitled to and did

receive $20,000 of the bonds guarantied by the Kansas Pacific Company, $15,000 stock in the Arkansas Valley Railway Company, together with $2,000 Clay county bonds.

Fifth. The railroad bonds were secured by mortgage upon the road, and when default in payment of interest had occurred, the trustees in the mortgage sold out the road and its belongings, and the proceeds were divided out among the bondholders, including Harrison, who credited on his bonds the sum he received. The allegations of the cross-bill with respect to the consolidation, in so far as it is deemed necessary to state them, are to be found in the opinion of the court.

The case is before the court on demurrer to the cross-bill of Harrison, which, it is conceded, presents all the material facts.

McCrary, *Circuit Judge.*—The intention of the Arkansas Valley Railway Company was to sell the stock to Harrison for less than its par value, *i. e.*, to give him $15,000 in stock, twenty bonds of the company guarantied by the Kansas Pacific Company, and the Clay county bonds, all for $15,000 in cash. There is nothing in the statutes of Colorado, where the corporation was created, to forbid the sale of stock at less than par, nor was Harrison forbidden to purchase the stock by reason of the fact that he was already a stockholder and director in the Kansas Pacific Railway Company. The transaction was, therefore, valid as between the corporation and Harrison, whatever the rights of the creditors of the corporation as against Harrison may be. *Scovill* v. *Thayer*, 104 U. S.

Such being the case, it cannot be said that Harrison obtained the bonds without consideration. He bought all the securities above mentioned for $15,000 in cash, and although the face value of the securities purchased is much more than $15,000, it does not follow that they were intrinsically worth more than that sum, and, in fact, the cross-bill alleges and

the demurrer admits that they were not intrinsically, nor in the market, worth the sum paid for them. It is, at all events, clear that the owner of such paper is at liberty to sell it at any price he pleases, unless prohibited by statute. The Kansas Pacific Company is bound by its guaranty of said twenty bonds. The pecuniary interest which that company had in the Arkansas Valley Company, and in the construction of the road from Kit Carson to Pueblo, was a sufficient consideration for the guaranty. It follows that Harrison may recover upon the bonds unless the railway company has shown some sufficient defense in equity. It is said, and it is true, that if the Union Pacific Railway Company is compelled to pay the sum due on these twenty bonds, it will have the right to recover from the stockholders of the Arkansas Valley Company, including Harrison, to the extent of their unpaid stock in that corporation. But in this case there can be no decree for contribution, because the necessary parties are not before us, and the pleadings are not framed with a view to such a decree. If the Union Pacific Company is liable for the sum claimed by Harrison, it must make payment, and then proceed against the stockholders, including Harrison, for contribution.

Our conclusion is that no sufficient defense, either at law or in equity, to the bonds in question has been shown, and that, as against the Arkansas Valley Company, the maker, and the Kansas Pacific Company, the guarantor, of said bonds, the plaintiff Harrison has a good cause of action.

The remaining questions are, what is the extent of liability of the Union Pacific Company, and what measure of relief is Harrison entitled to against it? The parties are now in a court of equity, and if their rights can be determined by a decree in the present case, that is sufficient for our present purpose. It may be that there is a right of action at law against the consolidated company, but, if so, we think it is not exclusive. If a creditor of the original corporation sees fit to proceed in equity to subject the property of that corpo-

ration in the hands of the consolidated company, he has a clear right to do so.

By the articles of consolidation, it is expressly provided that —

"Nothing herein shall prevent any valid debt, obligation or liability of either constituent company from being enforced against the property of the proper constituent company, which, by force of these articles, becomes the property of the consolidated company."

The cross-bill alleges and the demurrer admits that the consolidated company has received from the Kansas Pacific Company all its property, amounting to more than $10,000,000, and that the original corporation has practically ceased to be, and is merged in the consolidated company, having now no officers upon whom service can be made, and no property out of which an execution can be satisfied. We are of the opinion, that, under such circumstances, the consolidated corporation is liable in equity for the debts of the original corporation, at least to the extent of the value of the property received from it. If the new corporation admits (as it does by its demurrer in this case) that it has received and converted to its own use the property of the original corporation, to an amount largely in excess of the sum claimed, no inquiry is necessary, and relief may be had in the form of a decree for the sum due. If this be denied (as it may be by an answer) the court will hear the proof, and in that case it would become the duty of the Union Pacific Railroad Company to answer the interrogatories embodied in the cross-bill.

The demurrer to the cross-bill is overruled, and if the Union Pacific Company stands upon the demurrer, there will be a decree for the sum due upon the bonds, without prejudice to the right of the said company to proceed against the stockholders of the Arkansas Valley Railway Company, including Harrison, to compel contribution. We do not determine the question whether a creditor of the Kansas Pacific Company may maintain an action at law against the Union Pacific

Company to recover his debt. The correct determination of that question depends somewhat upon the construction of certain statutes, state and federal, some of which are not before us, and its decision is not necessary in the present case.

TREAT, *District Judge*, concurs.

Dyer & Ellis and *George M. Block*, for Harrison.

J. P. Usher and *H. D. Wood*, for the railroad company.

PETERS *et al. v.* THE LINCOLN & NORTHWESTERN RAILROAD CO. *et al.*

(District of Nebraska. October, 1882.)

1. RAILROAD CORPORATION — POWER TO LEASE — STATUTE CONSTRUED. Under the statute of Nebraska, the lease of a line of railway, or arrangement to lease, executed by one railroad corporation to another, to be valid, must be assented to by a vote of at least two-thirds of the stockholders of each corporation, in stockholders' meeting assembled.
2. SAME — AGREEMENT TO LEASE MADE IN ADVANCE OF CONSTRUCTION TO SECURE STOCK SUBSCRIPTIONS. — No agreement to execute such a lease, made in advance of the construction of a railroad, can be specifically enforced unless it is subsequently ratified by a vote of the stockholders, as provided by the statute.
3. CORPORATIONS — RIGHTS OF STOCKHOLDERS. — Persons subscribing to the stock of a corporation must take notice of the law creating it and defining its powers, and if the directors, in order to secure stock subscriptions, propose to do that which they are prohibited from doing by the statute, no subscriber can be heard to insist that the same shall be done contrary to such statute.

On demurrer to amended bill.

MCCRARY, *Circuit Judge.*— Upon consideration of the demurrer to the original bill in this case, it was held that under the statute of Nebraska, the lease of a line of railroad, or

an agreement to lease, executed by one railroad corporation to another, to be valid, must be assented to by a vote of at least two-thirds of the stockholders of each corporation, and that such assent must be expressed in a stockholders' meeting. It was, therefore, held that the agreement to execute such a lease, made without a meeting of stockholders, and without the assent of the requisite number of stockholders in meeting assembled, was invalid and could not be enforced. 2 McCrary, 275. Since this ruling an amended bill has been filed in which it is alleged, in substance, as follows:

First. That on the twenty-fourth day of June, 1879, the Atchison & Nebraska Railroad Company, in order to promote its own interest by securing the construction of the line of the Lincoln & Northwestern Railroad, issued a circular inviting persons to subscribe to the stock of the latter company, and stating that it was proposed that the company first named should lease the new road (meaning the road to be built by the last named company) for a term of thirty years, and pay as an annual rental therefor thirty-five per cent. of the gross earnings of the said new road, which, it was estimated, would provide for the payment of interest on the new bonds.

Second. That the members of said board of directors of the first named company were stockholders therein, and held in the aggregate more than two-thirds of the capital stock thereof, and that most if not all the other stockholders assented to the sending out of such circulars and proposal.

Third. It is further alleged, upon information and belief, that said members and stockholders did not intend to comply with said proposal if the same should be accepted; but, on the contrary, intended, after the same should be accepted and the proposed stock should be taken and the money therefor should be paid to said Lincoln & Northwestern Railroad Company, to hinder and prevent the making and execution of said lease, and to oppose and vote against the same as stockholders in case a stockholders' meeting should be called.

Fourth. The complainants subscribed for various shares of the stock of the last named company, and paid for same in full upon the faith of the proposal embodied in the aforesaid circular, and relying upon the same.

The prayer is that the Lincoln & Northwestern Railroad Company may be decreed to execute a lease of its road to said Atchison & Nebraska Railroad Company according to the terms and conditions of said proposal, etc., and that said last named company may be decreed to receive said lease and to perform and execute the same, and for an injunction to restrain the execution of a lease to the Burlington & Missouri River Railroad Company in Nebraska.

It is apparent that this relief can only be granted upon the theory that there has been a valid agreement to lease, which agreement can be enforced by decree for specific performance.

The facts alleged do not show the existence of such an agreement; they do not show a compliance with the statute, which plainly requires, as a condition precedent to the execution of such a lease, that the directors of each of the corporations shall call a meeting of the stockholders of each, at which meeting the holders of at least two-thirds of the stock represented at such meeting, in person or by proxy, and voting thereat, shall assent thereto.

The amended bill avers certain facts, tending to show the assent (outside of any meeting of the stockholders) of two-thirds of the stockholders of one company. This would not be sufficient even if the allegations applied to both companies; much less is it sufficient where they apply to one only.

Persons subscribing to the capital stock of a corporation are bound to take notice of the law creating it and defining its powers, and if the directors, in order to secure subscriptions to such stock, propose to do that which they are prohibited from doing by the terms of the statute defining their powers, no subscriber can be heard to say, as against the cor-

poration, that he has been misled and deceived thereby. All that subscribers to the capital stock in this case had a right to assume was, that the lease would be executed in accordance with law, provided a meeting of the stockholders should be held, and the same should be assented to by the holders of two-thirds of the stock of both corporations concerned.

Every subscriber to the stock of the Lincoln & Northwestern Railroad Company was bound to know that no valid lease could be executed, except in compliance with the statute above referred to.

The allegation that the directors of the Atchison & Nebraska Railroad Company acted in bad faith, and did not intend to vote for a lease in case a stockholders' meeting should be called, is not sufficient to authorize the execution and enforcement of such a lease contrary to the statute and without the assent of the stockholders as required thereby.

The demurrer to the amended bill is sustained.

E. Wakeley, for complainant.

T. M. Marquett, for defendants.

UNITED STATES *v.* HULL.

(District of Nebraska. November, 1882.)

1. INDICTMENT — FALSE CLAIMS AGAINST THE UNITED STATES. — Any person who makes, or causes to be made, or presents, or causes to be presented, any false claim against the United States, knowing the same to be false, or who, for the purpose of aiding another to obtain the payment of a false claim, by making or using, or causing to be made or used, any false bill, account, claim, certificate, affidavit or deposition, knowing the same to be false, may be punished under the provisions of section 5438 of the Revised Statutes of the United States.
2. SAME — SAME — STATUTE CONSTRUED. — The section above named is not limited in its operation to false claims presented by the ac-

cused on his own behalf, but applies as well to such claims presented by agents, attorneys and others, or, in other words, to every person presenting or aiding in the collection of a false claim, knowing it to be false.

3. INDICTMENT — DUPLICITY. — An indictment which charges that the defendant did, and caused to be done, a particular act, is not bad for duplicity.

McCRARY, *Circuit Judge (orally).*— We have considered the motion to quash the indictment in this case, and I am now ready to state the conclusions we have reached.

The indictment in the case charges, in substance — first, the making of false claims against the United States; and second, aiding another person to obtain payment of false claims against the United States. There are a number of counts in the indictment, but I believe they are all conceded to be substantially alike, and, therefore, it will be sufficient to consider the first count. This, after certain allegations setting forth that defendant was custodian of the United States court house and postoffice at Lincoln, and certain other allegations rather introductory in their character, not necessary to be repeated, proceeds thereafter to say that "defendant did wilfully, unlawfully and feloniously make, and cause to be made, and present, and cause to be presented, to an officer of the treasury department of the United States of America, a certain false, fraudulent and fictitious claim and account against the United States of America, for payment and approval, for eight hundred and six yards best quality Napier matting, at eighty cents per yard, alleged in said account to have been purchased from one Albert M. Davis, for the use of said building, at a price of $644.80, which said claim was false, fictitious and fraudulent, as said Dwight G. Hull well knew, and that said goods were never delivered by said Albert M. Davis, at the price named, or at the place named. Then follow allegations that the defendant, for the purpose of aiding to obtain payment of said claim, unlawfully and feloniously did make and use, and cause to be made

and used, a certain false bill, voucher, receipt, certificate or account, which is copied in the indictment, followed by the allegation that said voucher, receipt, bill or certificate was, and is, false, fictitious and fraudulent as to the cost or price of said matting, as the said Dwight G. Hull well knew, and the grand jury aforesaid, upon their oaths aforesaid, present that the said Albert M. Davis never received the sum of $644.80 for said matting from the United States or any other person."

Here is a very distinct and sufficient allegation of the two offenses to which I have referred, namely: first, the making and presenting of a false claim; and second, aiding another to obtain the payment of a false claim. We are of the opinion that these offenses, as here charged, come clearly within the provisions of section 5438, Revised Statutes of the United States, which provides that "every person who makes, or causes to be made, or presents, or causes to be presented, for payment or approval to or by any person or officer in the civil, military or naval service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing said claim to be false, fictitious or fraudulent, or who, for the purpose of obtaining, or aiding to obtain, the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, shall be imprisoned," etc.

It is not contended by counsel for defendant that this section of the statute does not describe in general terms the offense charged in the indictment, but, as I understand the counsel, they do insist that the statute applies only to a party who presents a false claim on his own behalf, and does not apply to a person who presents a false certificate or voucher on behalf of some other person, or in the name of some other person. We are unable to concur in this view of the

statute. It appears on the face of the statute that it is intended to apply to a case where a person makes, or causes to be made, a false statement of this character, or where he obtains, or is guilty of aiding to obtain, the payment or approval of any such false claim. The use of this language clearly implies that the statute is intended to cover a case where an attorney, agent, officer or other person undertakes to get a claim, which is false and fraudulent, allowed in his own behalf, or in behalf of any other party; otherwise the language "aiding to obtain" would have no meaning whatever. It is a matter of history that this legislation was intended mainly to put a stop to the practice which was said to prevail at the city of Washington and elsewhere, where claim agents and lobbyists, acting on behalf of others, were in the habit of manufacturing false and fictitious testimony — pension agents, and other agents of that character. We are clearly of the opinion there is nothing in the point to which I have referred.

It is argued that the indictment is bad for duplicity, because it alleges that the defendant "made, and caused to be made," this false voucher, certificate or claim, and that "he presented, and caused to be presented, the same;" but the authorities are abundant in support of the rule, that it is no objection to an indictment to say that "defendant did, and caused to be done," a particular act which is punishable by criminal statute; the allegation is good in that form, although the statute may employ the disjunctive conjunction "or" instead of "and."

The following are some of the authorities upon this point: *Commonwealth* v. *Turtchell*, 4 Cush. 74; *State* v. *Fletcher*, 18 Mo. 426; *Dunham* v. *State*, 1 Blackf. 33; *State* v. *Meyer*, 1 Speer (S. C.), 288; *State* v. *Kuns*, 5 Blackf. 314; *State* v. *Morton*, 27 Vt. 310; Archbold Crim. Law, vol. 2, p. 810.

Lambertson, United States Attorney, and *Webster*, for the United States.

Woolworth and *Thurston*, for defendant.

SUTRO *et al. v.* SIMPSON *et al.*

(District of Colorado. November, 1882.)

1. SUIT BY NON-RESIDENT — BOND FOR COSTS. — Under the statutes of Colorado, a suit brought by a non-resident of the state must, on motion by defendant in apt time, be dismissed, unless bond for costs was executed and filed at the time of the commencement of the suit. To execute the bond two days after the action is instituted will not avail.
2. SAME — REMOVAL TO FEDERAL COURT. — Though no bond for costs is required in case of suit originally brought in the United States court, yet when a cause is removed from the state court to the federal court, the latter begins where the former left off; and motion to dismiss for want of bond for costs having been entered in the state court, and pending at the time of removal, will be heard in the federal court and determined in accordance with the law applicable to the motion when made.

HALLETT, *District Judge.*—This action was brought in the district court of Arapahoe county on the twenty-seventh day of May last, to recover the sum of $4,500. Concurrently with the summons, plaintiffs took out a writ of attachment which was levied on defendants' goods, and, together with the summons, was served on defendants on that day. It is conceded that plaintiffs then were and still are citizens and residents of the state of New York, and that at the time of bringing the suit, no bond for costs was filed, as required by chapter XX of the Revised Statutes of the state. Two days later, and on the twenty-ninth day of the same month, such a bond was filed and approved by the clerk; and on the same day, but whether before or after the filing of the cost bond is not shown, defendants entered a motion to dismiss for want of a bond. On the first of June following, the cause was removed into this court on plaintiffs' petition, setting up the necessary facts as to the citizenship of the parties; and defendants, not having otherwise appeared, now urge their motion before the court.

Numerous cases are cited from the reports of this state and from the state of Illinois, in which a similar statute was

in force for some time, to the effect that the statute is imperative and must be observed. *Talpey* v. *Doane*, 2 Col. 298; *Filley* v. *Cady*, 3 Col. 221; *Hickman* v. *Haines*, 5 Gilman, 20.

The language of the act cannot be misinterpreted. After providing in the first section that security shall be given in a form which is prescribed, the first clause of the second section is as follows:

"If any such action shall be commenced without filing such instrument of writing, the court, on motion, shall dismiss the same, and the attorney for the plaintiff shall pay all costs accruing thereon."

The statute of Indiana, which was interpreted in *Cox* v. *Hunt*, 1 Blackford, 146, contained no such direction. In the absence of such provision, it may be reasonable to say that the defendant should be satisfied with security given when it is demanded. With such a provision in the law, it must be apparent that nothing short of absolute denial of the authority of the legislature can prevail against it. Nor is the bond for costs under a statute of this kind an element of jurisdiction. By failing to object in apt time, the defendant may waive it, and the court will have authority to proceed without it. *People* v. *Cloud*, 50 Ill. 444.

But the power of the court to proceed in a case where no objection is raised by defendant is not the matter in issue. That question is, whether, upon motion made in due time by defendant, the statute shall be enforced, and upon that there is no room for debate.

It is contended, however, that the motion to dismiss cannot be maintained in this court, inasmuch as the act of congress of 1875 declares that the action shall stand in this court as if originally brought therein; and no bond for costs is required of non-residents or others in suits brought in this court. The language of section 3 of the act of 1875 on that subject is as follows:

"And the said copy being entered as aforesaid in said cir-

cuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court."

It would be most extraordinary to regard this clause as depriving either party of any substantial right which could have been asserted in the state court, if the cause had remained in that court. In a case of defective service of process and after removal by plaintiff, it will hardly be claimed that the defendant will be precluded from objecting to the service by the requirement that "the cause shall proceed"—obviously the intent of the statute is to confer on the circuit court, in respect to such cases, as full and ample authority as is held in cases brought in that court. But this is not saying that a question which properly arose in the state court before the removal of the cause, and which remains undetermined, shall not be considered in the circuit court.

The manner of bringing the suit, and its progress while it remained in the state court, was subject to the law of the state, which may be administered here as well as in the state court. And the circumstance that the question could not have been raised in this court if the suit had been brought here, is of no importance. The paragraph cited from the act of 1875 is jurisdictional to the court and not a limitation of the rights of parties.

In the supreme court and in this court it has been held that in a cause removed from a state court to a federal court the latter begins where the former leaves off. *Duncan* v. *Gegan*, 11 Otto, 810; *Brooks* v. *Farwell*, 2 McCrary, 220.

We take the cause as we find it. Whatever has been determined in the state court is accepted in the circuit court as conclusively settled, subject to the jurisdiction of the supreme court to review it on writ of error or appeal. Whatever remains undetermined at the time of the removal is to be decided in the circuit court according to our own modes of proceeding, but with full recognition of all substantial rights. The motion to dismiss was filed in the district court of the

state in due time, and by the removal of the cause into this court the plaintiffs could not defeat either the right to have the motion heard, or the effect of it when it should be heard. If defendants had made the application to remove, perhaps the aspect of the case would be different; not because of any obstacle to the motion in this court, but the application to remove as an appearance by defendants, and a step taken in the cause might have been regarded as a waiver of the objection respecting the cost bond. But that view is not presented by the record. Plaintiffs brought the case here voluntarily, and defendants have not in any way changed the attitude assumed by them in the district court of the state. The bond filed two days after the suit was brought, without leave of the court, was not in compliance with the statute. It will be observed that the language of the act refers to the commencement of the suit as the time for filing the bond for costs. And it is in terms declared that if the suit shall be commenced without filing the bond, it shall be dismissed. However hard the law may appear to be, the remedy is with the legislature and not in the courts. The suit will be dismissed at the cost of the plaintiffs' attorneys.

Sleeth & Liddell, attorneys for plaintiffs.

M. J. Waldheimer, attorney for defendants.

ELGIN MINING AND SMELTING CO. *et al. v.* IRON SILVER MINING CO.

(District of Colorado. November, 1882.)

1. MINING CLAIMS — END LINES. — In the location of mining claims, "end lines" must be established as required by the statute, and where the locator fails to do this, the courts will not fix them by implication. If the end lines be absent, or so placed as not to define the right of the locator to the exterior parts of the lode, the defect cannot be supplied.

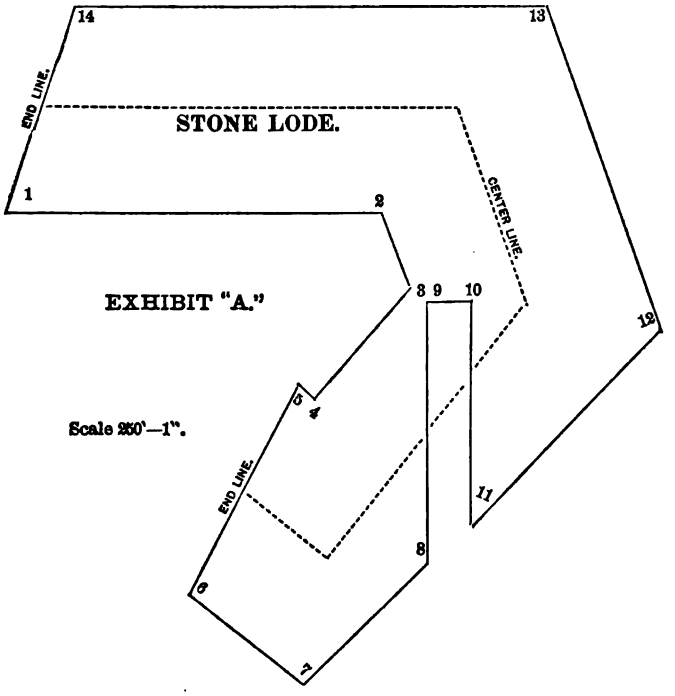
2. SAME—VALID ONLY WITHIN SURFACE.—In such case the location may be valid for all that can be found within the surface lines, but beyond those lines an essential element of the right to follow the lode is wanting, and therefore the right cannot exist.

HALLETT, *District Judge.*— On the twenty-ninth of June last the Elgin Mining and Smelting Company, a corporation of the state of Illinois, and several natural persons, exhibited in this court their bill of complaint against the Iron Silver Mining Company, a corporation of New York, to restrain a trespass of the latter company on the Gilt Edge mining claim, located in Lake county, Colorado. Asserting title to the Gilt Edge claim, plaintiffs alleged that they had found a lode therein, containing rich and valuable ore, and defendant, claiming the same ore as being in and of a certain other lode owned by it and called the Stone lode, was proceeding to remove the ore and convert it to its own use.

After notice defendant appeared and filed affidavits in opposition to plaintiff's application for injunction. As disclosed in the bill and affidavits, the controversy was mainly as to the right of defendant to follow the lode from the Stone claim owned and worked by it, beyond the lines of that claim and into the adjoining claim owned by plaintiffs.

In its ordinary form, this controversy presents questions of fact as to the existence of the lode in both claims, or the extension of it from one claim to the other. One party, claiming to own the top and apex of the lode, seeks to follow it on its dip through the side lines of his claim into the land adjoining, as the right so to follow it is defined in section 2322, Revised Statutes. The other, unable to deny the force of the statute, appeals to a jury on the point whether the top and apex of the lode arises in the ground of his opponent, or if there, whether the lode descends from that region to the place in dispute. In addition to these questions, which were not pressed at the hearing, there is another and a very extraordinary question arising out of the peculiar form and relative position of the claims.

And as it is very difficult to describe the claims fully in words, so as to explain the matter in dispute, a diagram will serve the purpose better.



The ore for which the parties are contending is within the surface lines of plaintiff's claim (the Gilt Edge), eastward from defendant's claim (the Stone), and adjoining the latter. It is reached by means of a perpendicular shaft from plaintiff's claim; and a tunnel or level, following, it is said, the course of the vein from a point in defendant's claim down the hillside, and below the other. Assuming, for the present, that the top and apex of the lode has been found in the Stone claim, owned by defendant, and that the lode in a downward course, and with distinct boundaries, passes east-

ward out of that claim and into the Gilt Edge claim, owned by the plaintiff, to the place in dispute, the right of defendant to follow it without the lines of the Stone claim, and take the ore therein, is denied on the ground that the latter claim is without end lines to define and limit such right. In the act of congress relating to mineral lands it is provided, in section 2320, that "the end lines of each claim shall be parallel to each other;" and in section 2322, that the right of possession to the "outside parts" of veins or ledges, referring to such parts as extend beyond the side lines of the location, "shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

In the Flagstaff case (8 Otto, 467), the acts relating to mineral lands were said to require that locations of veins or lodes shall be made lengthwise in the general direction of such veins or lodes on the surface of the earth; and that the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally.

The general practice in mining districts of making locations in the form of a parallelogram conforms to this view, which is now universally accepted as correct. Obviously it was not intended that a locator should secure more of the lode in the "outside parts" extending beyond the side lines than he could obtain on the course of the lode within the limits of the location. In other words, by a proper location he could secure one thousand five hundred feet on the strike of the lode, and by the extension of the planes of the end lines, he would be limited to the same number of feet laterally in pursuing the lode downwards without the side lines. Such limitation is necessary to define the miner's right beyond his own territory. If, when once without his own lines, he could turn to the right or left in search of ore,

the limitation to one thousand five hundred feet of the length of the vein would be made wholly nugatory, and there would be no end of conflicts between adjacent owners, for which no just rule of settlement would be found.

Referring to defendant's Stone claim, the line at the northwesterly end is said to be one of the end lines, and it is so marked on the diagram. In the first course of the location from that line, which is south eighty-three degrees east, there is no corresponding end line; and the same is true of the second course, south eighteen degrees east, and the third course, south forty-five degrees west, very nearly. It will be observed that the location is in the form of the letter A, truncate, and the locator has made a part of the inner line of the southern leg of the location three hundred feet in length, to correspond in direction with the line at the northwesterly end, and called it an end line. With superficial attention to the letter of the law, and in utter ignorance and disregard for its principles, the two lines were made of equal length and parallel to each other, but so arranged that they can never perform the office assigned to them in the law. What is called the southern end line is really on the northwest side of the greater part of the claim, and so placed that, when extended in a northerly direction, it must enter the inner line of the claim in a short distance from corner No. 5. In this position that line cannot enter the field north and east from the claim, being intercepted by the claim itself. And so it appears that eastward and southward from the northwestern end of the claim there is no line which can be recognized as an end line, and the claim has but one end line, or perhaps none whatever.

This view was not controverted at the hearing, but it was said that end lines may be a matter of legal inference and deductions from established facts to control even the act of the locator of the claim. As the law requires that a location shall be made along the course or strike of a vein at the surface of the earth, the end lines must of necessity be at

right angles to the course. And whenever the course or strike can be ascertained, at the points where it passes from the location, end lines should be fixed at right angles thereto, without reference to the end lines laid in the location. To apply this rule to defendant's claim, lines should be drawn parallel to each other at each end, and where the outcrop of the vein is said to pass out of the location, and in the general direction east and west, the strike of the vein being north and south

The circular form of outcrop is thought to be the result of erosion in California gulch, which comes down through the middle of the claim, and at some remote time the outcrop may have extended directly across the gulch between the ends of the claim, so as to admit of a location in the usual form with end lines as now proposed to be laid, in the general direction east and west. It is contended that in the location of a claim, which must of necessity be made before the strike of the lode can be ascertained, it is too much to expect the locator to lay his end lines in the proper direction; and locations made at various angles of divergence from the strike of the lode are cited to illustrate the fact that by a slight deviation from the proper course the object of making a location may be defeated. This, however, is only to say that it is difficult to make a good location of a mining claim when the situation of the ore is unknown, and that if the locator fails to lay his claim so as to secure the ore, the law should correct his mistake. Plainly enough the law requires the locator to fix the boundaries of the claim, offering the bounty of the government to the extent of the public domain from which to make the best possible selection. If the locator fails to choose wisely and well, the failure is with him, and it cannot be imputed to the law. There is no greater reason for saying that the end lines shall be established by inference and presumption from the course of the lode than that the side lines shall be so established. The rule of the early miners' law, which obtained in some mining

districts before the statute was enacted, was of the character which we are now asked to adopt. By locating on the vein the miner secured the number of feet allowed him, wherever it might extend, with surface ground adjacent; and, of course, the boundaries of the claim could only be known from the course of the lode. By the act of congress that rule was changed, and it was required that the boundaries of the claim shall be marked on the ground, and end lines and side lines are referred to in a way to show that they must be laid down with care. Under such a statute, it cannot be necessary to discuss at length the power of the court to establish lines by construction, for no such power can exist. The end lines established by the locator must control, and if absent, or so placed as not to define the right of the locator to the exterior parts of the lode, the defect cannot be supplied.

In that case the location may be valid for all that can be found within the surface lines, but beyond those lines an essential element of the right to follow the lode is wanting, and therefore the right cannot exist. With some information as to the situation of the ore and the law relating to the subject, the end lines of the Stone claim could have been laid as it is now said they should be placed, and the failure to do so was owing to ignorance of facts necessary to intelligent action. It presents the common case of failure to obtain property through a mistake of fact or law, for which the party seeking the property is alone responsible. Against such error and misfortune the law does not relieve.

At the hearing on plaintiff's motion for injunction to restrain the Iron Company from working within the limits of the Gilt Edge claim, these reasons were thought to be sufficient to support the application, and the injunction was allowed. Recently the defendant has brought in a cross-bill, asking to enjoin the plaintiff from working in the same ground, and on that motion the whole subject has been reviewed with the result now to be stated.

The defendant, in virtue of its ownership of the Stone claim,

has no right to anything beyond the lines of that claim, in any direction, and therefore the motion must be denied.

Markham, Patterson & Thomas and *M. B. Carpenter*, for plaintiff.

Jonas Seeley, for defendant.

LEWIS *v.* MEIER *et al.*

(District of Kansas. November, 1882.)

1. EQUITY — FRAUDULENT CONTRACT — NO RELIEF TO EITHER PARTY TO THE FRAUD. — The general rule is, that a court of equity will not interfere in behalf of either party to a contract fraudulent as to both parties, either to enforce or set aside the same, or award damages for a breach thereof.
2. SAME — SAME — CORPORATIONS ARE BOUND BY THE SAME RULE. — A corporation may be guilty of fraud, and if through its board of directors it enters into a fraudulent contract, it is subject to the rule above stated.
3. CORPORATIONS ARE BOUND BY ACTS OF THEIR AGENTS OR DIRECTORS, IN CERTAIN CASES. — A contract made by the directors of a corporation in the course, and within the general scope of their powers and duties, is to be regarded as made by the corporation, although in making it the directors may have acted fraudulently. The rule is the same as that which prevails between private individuals.
4. RULE APPLIED. — Where a railway corporation, through its board of directors, entered into a contract for the construction of a part of its road with certain persons, some of whom were directors of the company, and, in pursuance of that contract, executed its bonds in a large sum secured by mortgage upon its property: *Held*, that although the contract be held void, yet the corporation, being itself a party to the fraud, could not maintain a bill to set aside and cancel the mortgage as a cloud upon its title.

MCCRARY, *Circuit Judge.*—This suit was originally brought to foreclose a mortgage executed by the Kansas Pacific Railway Company to certain trustees to secure bonds to the amount of $6,500,000. The original bill has been dismissed,

and the case stands upon a cross-bill filed by the defendant company, in which it is alleged that the mortgage above referred to is fraudulent and void, and ought, therefore, to be canceled as a cloud upon its title. It is alleged that said mortgage was executed as part of a scheme whereby the directors of the company united with certain others to enter into certain contracts with the company to build a portion of the company's railroad, and to receive certain considerations therefor. In other words, it is alleged that the directors of the company were members of a construction company to which the bonds secured by said mortgage were issued; and that they contracted fraudulently with themselves. Conceding, for our present purposes, the truth of these allegations, the question arises, can the defendant company be granted the affirmative relief prayed for? The general rule is, that a court of equity will not in such cases interfere in favor of either party, either to enforce or set aside the contract, or to award damages for its breach. The parties being *in pari delicto*, the court will leave them where it finds them. If this were a contract between natural persons, there could be no doubt about the application of this doctrine; but it is said that the rule does not apply to the defendant corporation, because while the contract was made in the corporate name, the corporation is not, within the meaning of the rule, a party to it, since in making it the directors exceeded their authority. To sustain this view would be, in effect, to hold that a corporation can in no case be guilty of fraud; for, being an artificial being, it can act only through agents; and it would be impossible in any case to show that the charter of a corporation expressly authorized the perpetration of a fraud. It is, however, well settled that a corporation may be guilty of a fraud. The courts have gone further and held such artificial persons liable in tort in certain cases. The true rule is, that such acts as are done by the directors in the course and within the scope of their powers and duties are to be regarded as the acts of the

corporation. Such is the rule, even if the acts are unlawful and tortious. 2 Hilliard on Torts, 322; *Popeley* v. *The G. & B. Sewing Machine Co.* 2 Wood, 494; *Railroad Co.* v. *Quigley*, 21 How. 202; *Sandford* v. *Hundy*, 23 Wend. 260; *Brokam* v. *The N. J. etc. Transp. Co.* 32 N. J. Law, 331; *Fogg* v. *Griffin*, 2 Allen, 1; *Rives* v. *Plankroad Co.* 3 Ala. 92; *Litchfield Bank* v. *Peck*, 29 Conn. 384; *Lee* v. *The Village of Lundy Hill*, 40 N. Y. 442; *Perkins* v. *Railroad Co.* 24 N. Y. 213.

These authorities abundantly show that if the directors or agents employed by a corporation conduct themselves fraudulently, so that if they had been acting for private employers, such employers would have been affected by their frauds, the corporation is, in like manner, and to the same extent, affected by them.

In other words, the settled doctrine is, that a corporation can no more repudiate the fraudulent acts of its agents than an individual can. The rule is the same as to both. The doctrine as applicable to private individuals is familiar. The principal is liable for the acts of the agent, not alone in cases where they are expressly authorized, but also in all cases where such acts come within the range of the agent's duties.

In the case of the *Railroad Company* v. *Quigley*, *supra*, Mr. Justice Campbell says: "The result of the cases is, that for acts done by the agent of a corporation, either *in contractu* or *in delicto*, in the course of its business, or of their employment, the corporation is responsible as an individual is responsible under like circumstances."

In that case the corporation was sued for libel, and held liable, the defense that the defendant was a corporate body with defined and limited powers being overruled. It was argued that the corporation, being a mere legal entity, it was incapable of malice, which is a necessary ingredient of a libel. The defense there, as here, was that the directors acted outside of their authority, and bound themselves as individuals only. But the court said (p. 209): "To support

this argument we would be required to concede that a corporation could only act within the limits and according to the faculties determined by the act of incorporation, and that, therefore, no crime or offense can be imputed to it. That although illegal acts might be committed for the benefit or within the service of the corporation, and to accomplish objects for which it was created, by the direction of their dominant body, that such acts, not being contemplated by the charter, must be referred to the rational and sensible agents who performed them, and the whole responsibility must be limited to those agents; and we should be forced, as a legitimate consequence, to conclude that no action *ex delicto* or indictment will lie against a corporation for any misfeasance.

It is true that the question there was, whether the corporation was liable in damages for injuries caused by a malicious libel; but if the corporation is liable for *one* of the consequences of an unauthorized and illegal act of its agents, on the ground that the act was done "to accomplish objects for which it was created," it is clearly liable for *all* such consequences. Here one of the consequences of the illegal and fraudulent contract is, that neither party shall be heard in a court of equity to demand any relief either enforcing or annulling the same. This is a rule of great general importance, and one which the courts are often called upon to enforce in the interest of sound morality and for the public good. To sustain the present cross-bill would be to determine that the rule has no application to corporations, and that these artificial persons, who act from necessity only through agents, may, through such agents, enter into fraudulent and immoral contracts; and, after receiving their benefits, may ask a court of equity to cancel them on the ground that they are contrary to public policy.

We cannot give our assent to such a doctrine. A very large proportion of the most important business of the country is transacted by these artificial persons, and they

control vast aggregations of wealth, and exercise vast powers. It is the sound policy of the law to apply to corporations, as far as possible, those rules of good conscience and equity which are enforced as between man and man. The contract now in controversy was made by the board of directors for the purpose of constructing a railroad, which the corporation was clearly authorized to construct. It was therefore within the general scope of their powers. The corporation may be permitted to defend against the contract on the ground that it was fraudulent as alleged; but if so, it is not because the corporation has any special claims to the favor of a court of equity in that regard, but solely upon the ground that neither party to a fraudulent contract (both having participated in the fraud) can demand its enforcement. The company is not entitled to affirmative relief, and therefore the cross-bill is dismissed.

FOSTER, *District Judge*, concurs.

J. P. Usher, for complainant in cross-bill.

Glover and *Shepley*, for defendants.

MOLLANDIN *v.* THE UNION PACIFIC RAILWAY CO.

(District of Colorado. October, 1882.)

1. EMINENT DOMAIN — USE OF STREET IN A CITY FOR RAILROAD PURPOSES — RIGHTS OF OWNERS OF ABUTTING LOTS. — Under sec. 15, art. II, of the constitution of the state of Colorado, the owners of lots abutting on a street in a city are entitled to compensation for the use of the street for railroad purposes.
2. SAME. — Whether the title to the street is in the owners of lots or in the city, the rule is the same. Rigney *v.* City of Chicago, 102 Illinois, 64, followed.

Plaintiff set up title to lots 1 to 7 inclusive, in block 1, in Hoyt & Robinson's addition to the city of Denver, fronting

two hundred and sixteen feet on Wewatta street, on which he had erected a hotel and several dwelling houses. After the buildings were erected, and in September, 1881, defendant laid a railroad track through Wewatta street in front of plaintiff's property, about eighteen and one-half feet from the sidewalk. The track is above the level of the street, and in itself a considerable obstruction to loaded wagons, and light wagons could not pass over it easily in front of plaintiff's property. But the crossings on either side at Nineteenth and Twentieth streets are convenient for all vehicles. Two other tracks were laid in Wewatta street on the opposite side from the plaintiff's property by other companies which were not parties to this action. Plaintiff alleged that by the track laid by defendant, and the use made of it, his "facilities for ingress to and from his said hotel and dwelling houses and lots have been greatly interrupted and cut off, and his said hotel and dwelling houses have been exposed to damage by fire, and the rental value of his property greatly diminished, and he was subjected to great inconvenience, to his damage in the sum of $15,000."

The answer denies most of the allegations of the complaint and alleges that the Colorado Central Railroad Company, in May, 1871, owned a railroad extending from Golden to Denver and elsewhere in the state of Colorado; that the city of Denver then, and ever since that time, owned the said Wewatta street by title in fee, and that on the twenty-fifth day of May, 1871, the city by ordinance granted to said Colorado Central the right of way for its track in and through the said Wewatta street. The ordinance was set out in the answer in full, and appeared to be of the scope and effect as stated. It was further alleged that on the first day of March, 1879, the said Colorado Central Railroad Company made and executed to the defendant a lease of its lines, tracks, rolling stock and property, and all its franchises, whereby the defendant acquired a right to build its said road in the said Wewatta street.

Plaintiff denied that the fee to the said Wewatta street was in the city, and claimed that the dedication of the street to public use, by Hoyt & Robinson, was an easement only, reserving the fee to the owners of abutting lots. It was understood that this point would turn on the meaning and effect of certain statutes of the late territory, in force at the time the plat of Hoyt & Robinson's addition was put on record, and also on the grant attached to the said plat. The case went off on another point, however, and the matter of the ownership of the street was not in any way investigated.

It seemed to be conceded in the replication to the answer, and by plaintiff's counsel at the trial, that the right of way in Wewatta street was given by ordinance to the Colorado Central Railroad Company, and that the latter company had executed a lease to defendant as alleged in the answer.

But it was contended that this was no defense to the action, because the right and interest of the plaintiff in the street in front of his property is secured to him by section 15 of the bill of rights of the state constitution (R. S., p. 30). That section declares "that private property shall not be taken or damaged for public or private use without just compensation;" and although it has been said that property cannot be "taken" within the meaning of that provision except by an appropriation of the land itself, no such limitation is applicable to the clause relating to damages. The beneficial use of plaintiff's estate embraces the right of ingress and egress, which cannot be withdrawn or obstructed without substantial damage to it. The use of Wewatta street is therefore a right of property in plaintiff, which, if not "taken," is certainly "damaged," within the meaning of the constitution, by the act of defendant in building its road through that street. This point did not arise in the case of the present plaintiff against the Colorado Central Railroad Company, reported in 4 Col. 154, and that case is not controlling. The question is discussed in *Rigney* v. *Chicago*, 102 Illinois, 64, with the result now suggested.

That case is very significant, showing that a change in the phraseology of the constitution of the state of Illinois was intended to enlarge the remedy.

Of this opinion was the court (Hallett, J.), and the jury was advised that the plaintiff was entitled to damages. And after deliberating they returned a verdict of $1,850.

Several questions relating to the measure of damages are to be considered on motion for new trial.

S. E. Browne, for plaintiff.

Willard Teller, for defendant.

NEWMAN *et al.* *v.* NEWMAN *et al.*

(District of Colorado. October, 1882.)

1. AFFIRMATIVE MATTER IN ANSWER — REPLICATION. — In ejectment for a mining claim, where defendant sets up title in himself, the plaintiff must reply.
2. COURT CANNOT VACATE JUDGMENT AFTER TERM. — After the term has closed, the court has no power, without the consent of parties, to vacate a judgment. A stipulation consenting to vacate within a certain time is wholly inoperative after the time specified has elapsed.
3. FINAL JUDGMENT. — A judgment for defendants, for want of replication to answer, is a final judgment.

Motion to vacate judgment.

HALLETT, *District Judge.* — Ejectment in the district court of Lake county to recover the Jessie Clark lode; thence removed into this court. Answer filed in this court May 12, 1880, denying plaintiffs' title to the Jessie Clark lode, and setting up title in the defendants to the same ground, as the Virginius lode. Under section 250 of the Code of Civil Procedure, the claim of a defendant in ejectment to the premises in controversy, under a location differing from that

from which plaintiff derives title, is regarded as new matter requiring a replication. After providing that a defendant may deny the allegations of the complaint, or disclaim any interest in the premises, the section declares that:

"The answer may also state generally, as in the complaint, the character of the estate in the premises, or any part thereof, which the defendant claims, or any right of possession or occupancy he claims."

This serves to bring into the case new facts, requiring a denial from the plaintiff, and, if not denied, they are, by section 72 of the code, to be taken as true. In that view, and according to the practice of the court, on the sixth day of July, 1880, nearly two months after the answer was filed, defendants took judgment against plaintiffs, for want of a replication. This was at the May term, 1880, of the court, which was adjourned July 10th of that year. After the court adjourned for the term, and on the nineteenth day of July, 1880, the counsel who had obtained the judgment entered into a stipulation with counsel representing the plaintiffs, to the effect that the judgment should be set aside on some rule day or on the first day of the next term of the court, with leave to plaintiffs to reply to the answer; and the stipulation was filed in the cause.

It is said that, at the time judgment was entered, one of the counsel for defendants, Mr. Bates, had agreed with plaintiffs' counsel, Mr. Thompson, to give further time for filing a replication to plaintiffs' answer; and Mr. Green, who was also counsel for defendants, in ignorance of that agreement, took judgment against plaintiffs. These circumstances led to the stipulation before mentioned. The judgment was not, in fact, set aside at the time specified in the stipulation, or at any time; and defendants have now discharged Mr. Green from the case, and refuse to be bound by the stipulation. But that is not important, as the time within which it was to be executed has passed.

Without consent of parties, it is believed that the court

has no power to vacate a judgment after the term has passed in which it was entered. *Bank of U. S.* v. *Moss*, 6 How. 31; *Assignees of Medford* v. *Dorsey*, 2 Wash. 433; *Becker* v. *Sauter*, 89 Ill. 596.

Defendants' agreement to open the judgment was probably subject to be revoked at any time before it should be executed. But, at all events, it was not executed within the time specified, and it is not now of any force or effect.

If it is thought that the proceedings of this court may be subject to the provisions of section 75 of the code, by which a person may obtain relief from a judgment entered against him "through mistake, inadvertence, surprise or excusable neglect," it will be seen that the limitation of five months, within which the motion must be entered, has passed. The suggestion that the judgment in this case was not final cannot be entertained. It is as final and conclusive of the rights of the parties as any which can be given in an action of this kind. The court is without power to give relief in this form at this time, and the motion will be denied.

Charles J. Thompson, for plaintiffs.

L. S. Dixon, for defendants.

PRINCE *v.* ROBINSON'S ADM'RS.

(District of Colorado. October, 1882.)

1. EXECUTORY CONTRACT — DEATH OF PARTY THERETO, EFFECT OF.— On the fifth day of March, 1880, George B. Robinson executed and delivered to plaintiffs' assignor options for stock as follows: "For value received, D. F. Verderal may call on me for five hundred shares of the capital stock of the Robinson Consolidated Mining Company, at five dollars per share, at any time until January 1, 1881. The bearer is entitled to all dividends declared during the time.

(Signed) "G. B. ROBINSON."

Upon the contracts were imprinted words signifying that they were redeemable at the American Exchange National Bank, New York.

Robinson died early in December, 1880. After his death and within the time prescribed in the contracts, but before administration on the estate of Robinson, plaintiff appeared at said bank, demanded the stock and tendered payment therefor, which was refused. After letters of administration plaintiff sues, etc.

Held, that the agreements were merely executory, and no right to action had accrued thereon at the time of Robinson's death. At that time something remained to be done by both parties; one of them having become incapable of acting, it follows that the agreement could not be executed until administrators were appointed. The administrators are not bound, no demand having been made on them within the time limited by the contract or at any time.

HALLETT, *District Judge*.— This suit against the administrators of George B. Robinson, deceased, is brought on two contracts executed by Robinson, in his life-time, to D. F. Verderal and L. L. Verderal, and by them assigned to plaintiffs.

The first of these contracts is as follows:

"NEW YORK, March 5, 1880.

"For value received, D. F. Verderal may call on me for five hundred shares of the capital stock of the Robinson Consolidated Mining Company, at five dollars per share, any time until January 1, 1881. The bearer is entitled to all dividends declared during this time.

"Expires December 31, 1880. G. B. ROBINSON."

And the second is for the same number of shares, and in the same words, except the name of the promisee. At the time the contracts were executed, words were impressed thereon signifying that they were redeemable at the American Exchange National Bank, New York city, and it is conceded that they were payable at that place. Robinson died early in December, 1880, before the expiration of the time in which the stock could be demanded, and soon thereafter, and during the same month of December, plaintiffs called on the bank for the stock, offering to pay the price mentioned in the agreement. The officers of the bank refused to deliver the stock, or accept the money, saying, in

substance, that, by the death of Robinson, their authority to act was withdrawn. At that time, letters of administration on the estate of Robinson had not been issued. Defendants were appointed to be administrators in January, 1881, and about the twentieth of that month tendered the stock to plaintiffs, and plaintiffs refused to accept it. The stock had then declined below the price mentioned in the agreement.

No question is presented as to the character or validity of the contracts. But the point in dispute is as to the sufficiency of the demand for the stock at the bank, after the death of Robinson, and before administrators of his estate were appointed.

It will be observed that the agreements were executory, and no action had accrued thereon at the time of Robinson's death. The demand necessary by the terms of the agreements to secure the stock, or damages for the failure to deliver it, had not then been made, and it was uncertain whether such demand would be made. These agreements, usually called options, giving the promisee a right to call for stock, leave the whole matter in his election, so that it is impossible to say that they will ever be executed. Clearly enough, there was no right of action in plaintiffs, on these agreements, against Robinson in his life-time, and if not against him, in what manner shall it be said that the action may arise against his personal representatives? As something was yet to be done by both parties to the agreements, and one of the parties had become incapable of action, it would seem to follow that the agreements could not be executed, nor could there be a default in executing them without some one to represent the deceased party. A demand was to be made for the stock. Of whom? Not of Robinson, he being dead; but of some one having authority to represent his estate. The money was to be paid for the stock, not to Robinson, but to his personal representatives. These things could not be done until administrators of the estate should be appointed, for the reason that, in so far as they were to be done by Robinson, there was no one to act.

It is not the case of a contract fully executed by the survivor, leaving only a duty to be performed by the deceased; as where one sells property and receives the consideration, and dies; or borrows money, and dies before repaying it. In this instance, something was to be done by plaintiffs, and by Robinson, which had not been done at the death of the latter. In other words, the contracts were executory at Robinson's death, and to proceed in the execution of them, or to declare a breach of them, in the absence of the representatives of the estate, is in the nature of things impossible. Not having called the stock in the life-time of Robinson, plaintiffs were bound to demand it of the administrators, and as the demand was not made, there is no right of action. The point that the death of Robinson did not dissolve the contracts, or absolve his estate from liability, which was much pressed in argument, may be conceded. But that is not the matter in issue. In respect to the unsettled affairs of deceased persons, the law can do no more than to appoint a living representative for the deceased, and bind him to fulfil the latter's obligations to the extent of the assets in his hands. In doing so, loss must often ensue, for which there is no remedy.

The circumstance that a place for delivering the stock and receiving the money was specified is of no weight. Whether the contracts are to be understood as requiring Robinson to be present at the bank to fulfil them, or to appoint the bank, or some other person, to act for him, the result was the same. In any case, he was incapable of acting in person, or by agent, at the time the stock was demanded, and no demand on him at the bank, or elsewhere, would be effectual. As the administrators were not then in authority, a demand on them could not be made. And so it turns out that plaintiffs' proceeding in that behalf was entirely nugatory.

The motion will be denied.

Willard Teller, for plaintiffs.

G. G. Symes, for defendants.

TABOR *v.* BIG PITTSBURG CONSOLIDATED SILVER MINING COMPANY.

(District of Colorado. January, 1883.)

1. ATTACHMENT — DOES NOT LIE IN ACTIONS OF TRESPASS. — Under the statute of Colorado an attachment is not allowed in actions of trespass, even though the plaintiff elect to waive the trespass and sue as for money had and received by defendant to his use. The implied promise in such case is a pure fiction of the law, invented to support the old action of assumpsit. Taking ore from a mine without the consent of the owner is a trespass in which none of the elements of a contract can be found.

HALLETT, *District Judge.*— The substance of the complaint is, that defendant has entered the Matchless mine in Lake county, which is owned by plaintiff, and has taken therefrom ore of the value of $109,388, and has sold and converted the same to its own use. The fourth paragraph of the complaint is as follows:

"That plaintiff now elects to waive the trespass so as aforesaid committed by defendant in mining and getting said ore, dirt and mineral-bearing rock from said Matchless lode, mine and premises, and sues defendant in an action for money had and received, for plaintiff's use, for the money received by defendant for said ore, dirt and mineral-bearing rock so as aforesaid dug, mined, got out of said Matchless lode of defendant, and by it sold and converted into money and money's worth."

Suit was brought in the district court of Lake county on the first day of August, 1881, and on the fifth day of the same month the attachment was sued out, against which the present motion is directed. The motion was, however, filed in the district court of Lake county, August 13, 1881, and within the time limited for answer, as provided in section 113 of the code of the state. The motion was not decided in the state court, and the cause having been removed into this court very recently, it remains for consideration here.

The statute of Colorado gives the writ of attachment in actions on contracts express or implied. Code, sec. 91. And the question is, whether this action is of that character. Taking the ore from the Matchless mine without the consent of the owner was certainly a trespass in which no element of a contract can be found. But it is said that the plaintiff may waive the trespass and sue for the proceeds of the ore as money due on contract. And that proposition is everywhere admitted. Indeed, some courts go further and say that an action for the value of the property tortiously taken, as for money had and received, may be maintained when the property has not been converted into money. *Norden* v. *Jones*, 33 Wis. 600. Compare *Moses* v. *Arnold*, 43 Iowa, 187.

The promise to pay the value of the property or the money received for it in such cases, which gives to the transaction the quality of a contract, is, however, a pure fiction supplied by law to support the action. As it was invented to support the action of assumpsit in the old procedure, and the forms of action have been abolished, a learned author suggests very forcibly that it should not be recognized in modern practice. Bliss on Code Pleading, secs. 128, 152 *et seq.*

And there are reasons for believing that the statute governing attachments refers only to contracts existing within the intention of the parties making them. The conduct of parties is often such as to give form to an agreement or understanding which they do not express in words, but fully intend to carry out. As where one takes an article of merchandise from a store in which he usually deals, with the assent of the owner, but without words, the intention to buy the article at the current price is fully understood, although not expressed. The statute may be taken to refer to such implied contracts more than to others, which were invented to support a form of action in the common law procedure.

Plaintiff's counsel presented many cases to show that an

action *ex contractu* may be brought for property tortiously taken; but none of them affirm the right to an attachment for the same cause, except in states where the acts in terms extend to torts. *Graves* v. *Strozier*, 37 Ga. 32; *Davidson* v. *Owen*, 5 Minn. 69.

If the acts of the several states allowing the writ of attachment in actions on contract have been held to embrace cases which really sound in tort like the one at bar, there should be something in the reports on the subject. But no case has been cited to support that view. And the court has found but one case of an attachment maintained upon a contract which may be said to be a clear implication of law; and that one may be assigned to the class of tacit agreements already mentioned, which, if not expressed in words, are evincible from the acts of the parties and stand fully with their intention. In that case money was advanced on an agreement to construct certain machinery, which agreement was not performed, and it was thought that the money so advanced might be recovered by attachment under a statute which allowed the writ in an action "upon a contract expressed or implied for the direct payment of money." *Peat Fuel Co.* v. *Frick*, 53 Cal. 304.

In the same state it was held that attachment would not lie for money lost at play by plaintiff's clerk. *Babcock* v. *Briggs*, 52 Cal. 502.

If, however, the meaning of the attachment act on this point is doubtful, it is believed that the course of legislation on the subject will afford the means of resolving the doubt. In 1872 the legislature of the territory, in an act "defining further causes for attachment," gave the writ in actions "to recover damages for trespass on any lode or mining property." Ninth Sess. Territorial Assembly, p. 116. In 1876 amendments were made in the attachment act, in the course of which the legislature declared that nothing therein should affect the prior act of 1872. Eleventh Sess. Territorial As-

sembly, p. 27. In 1877, after admission of the state, the same act was inserted in the code as section 119, and a part of the statute now in force relating to attachments. Thus it appears that, under the former act of the territory governing attachments (R. S. 1868, p. 52), it was thought necessary to pass a special act giving the writ in actions to recover the value of ore taken from a mine. And after five years' experience of the act so passed, it was retained in the laws of the state in connection with the present act. In 1879 the legislature repealed it unconditionally (Second Sess. 230), thus withdrawing the process of attachment from cases of this kind after it had been in use upwards of seven years. By this course of proceeding, the intention of the legislative assembly respecting the process of attachment in actions for trespass to mines was sufficiently expressed, and there is now no room for doubt in the matter.

It is true that the act embraced all injuries to mines, and was, therefore, more comprehensive than the present action. But this case is certainly within the terms. It is, in substance, an action of trespass, and will remain such, although called by another name. In practice the act of 1872 was resorted to, mainly, if not entirely, in actions to recover the value of ore taken from mines. Sometimes it became an instrument of oppression in the hands of adverse claimants, and an inconvenient method of trying title to mines. The legislature may have recognized the fact in repealing it; but however that may be, it is enough to know that the act has been repealed. We are not required to examine other clauses of the act now in force to find out whether that which was repealed is lurking elsewhere; but we must assume that the legislature intended to discontinue the process of attachment in all actions originating in trespass to mines.

This action is of that character, and therefore the motion to quash will be sustained.

In another case, entitled the *Iron Silver Mining Co.* v. *Joseph Doyle*, the same question is presented, and the same order will be made.

L. C. Rockwell, for plaintiff.

S. P. Rose, for defendant.

HECKLING, Executrix, *v.* ALLEN.

(District of Colorado. December, 1882.)

1. JUDGMENT — POWER OF COURT OVER, AFTER TERM.— Suit was brought in Colorado on a judgment rendered by the superior court of Cook county, Illinois, and judgment was rendered here. Subsequently the Illinois judgment, the case being removed by writ of error to the appellate court of that state, was reversed. Defendant sets up these facts in a petition, and moves that the judgment be vacated. *Held*, that such proceeding is allowable.
2. SAME — CIRCUMSTANCES ARISING AFTER JUDGMENT.— While it is the general rule that, as to all matters that were in issue, or which might have been contested at the time judgment was rendered, the court has no power to vacate judgment after the expiration of the term at which it was rendered, yet as to matters arising after the judgment or before the judgment but too late to be presented as a defense, the rule is different. Relief in such case may be had by motion to vacate or otherwise, as the circumstances may require.
3. THE ISSUE GROWING OUT OF THE SUBSEQUENT FACTS MUST BE TRIED.— In this case the judgment of the superior court having been reversed and the case remanded for retrial there, proceedings in this court will be stayed until final action by the courts of Illinois, when proper steps can be taken to afford relief, either by a renewal of this motion, or by proceeding in equity, or otherwise, as the circumstances may require.

On motion to vacate judgment after the term.

HALLETT, *District Judge.*— This suit was brought March 2, 1880, in the district court of Lake county, on a judgment recovered in the superior court of Cook county, Illinois,

February 14, 1880, for the sum of $11,540. A writ of attachment was issued and levied on certain property which was claimed by third parties under a mortgage from Allen. No defense to the action was made except by demurrer to the complaint and motion to dissolve the attachment, and the cause having been removed into this court September 13, 1880, judgment was entered here October 30, 1880, in favor of plaintiff's testator and against defendant Allen for $12,059.30.

At this term defendant has filed a petition setting up the proceedings in this court and alleging that in November, 1881, he caused the judgment of the said superior court of Cook county, Illinois, to be removed into the appellate court of the first district of Illinois by writ of error, and that such proceedings were had in the said appellate court, that on the twenty-sixth day of October last past the judgment of the said superior court was reversed, and the cause remanded for further proceedings. That on the thirtieth day of October, 1882, plaintiff moved the said appellate court to strike out the order remanding the said cause to the said superior court, and to allow an appeal from the judgment of the said appellate court to the supreme court of Illinois, which motion was denied. Wherefore defendant asks that the judgment of this court entered on the thirtieth day of October, 1880, and all proceeding thereunder in the sale of certain property, real and personal, be set aside and for naught held.

The substance of the matter is, that since the judgment of this court was entered, the judgment of the superior court of Cook connty, Illinois, on which the same was based, has been reversed, and no authority remains in any tribunal to reinstate it. Therefore the judgment of this court and all proceedings thereunder should be vacated and set aside. The facts set out in the petition are sufficiently established by a transcript of the proceedings in the appellate court of Illinois, and they are not controverted by plaintiff. But it

is contended that after the term in which judgment was rendered the court has no jurisdiction of the case to vacate the judgment or make any order affecting it. Unquestionably the general rule as to all matters which were in issue or which might have been contested in the cause at the time judgment was rendered, is as stated. *Bank of U. S.* v. *Moss*, 6 How. 31; *Cook* v. *Wood*, 24 Ill. 295; *Spafford* v. *Janesville*, 15 Wis. 474.

The rule was enforced in this court in a case in which, after the term in which judgment was entered, the parties agreed to vacate it, but failed to carry out the agreement within the time limited by them. *Newman* v. *Newton*, *ante* p. 293.

But as to matters arising after judgment or before judgment and too late to be presented as a defense in the action, the rule appears to be different:

As that the defendant was discharged under an insolvent act on the day judgment was entered. *Baker* v. *Judges of Ulster*, 4 Johns. 191.

That the defendant became bankrupt after the cause of action accrued, and obtained a certificate after judgment. *Lister* v. *Mundell*, 1 Bos. & Pul. 428.

That an agreement relating to the manner of paying the judgment has been made. *Cooley* v. *Gregory*, 16 Wis. 322.

That an act forbidden by injunction has become lawful since the decree was entered. *Pennsylvania* v. *Wheeling Bridge Co.* 18 How. 421; *Wetmore* v. *Law*, 34 Barb. 515.

"When the case is such that the defendant ought to have relief, his remedy is a direct proceeding to get rid of the judgment, either by setting it aside or obtaining an order for a perpetual stay of proceedings. This relief is granted in a summary way, on motion, by the court in which the judgment was rendered, and upon such terms as the justice and equity of the case may require. If the judgment was irregularly entered it will be set aside and the defendant

allowed to plead his defense. In cases where he has had no opportunity to plead, as where the original debt or demand was satisfied, released or discharged between the verdict and the judgment, the judgment will either be set aside or a perpetual stay of proceedings will be ordered, as the circumstances of the case may require; and where some matter arises after the judgment which should preclude the plaintiff from having execution, a perpetual stay of proceedings or an acknowledgment of satisfaction will be ordered. Formerly the remedy in such cases was by writ of *audita querela*, but the courts began about two centuries ago to give a more cheap, expeditious and equally efficient remedy by motion, and the writ of *audita querela* has everywhere fallen into disuse." Bronson, C. J., in *Clark* v. *Rowling*, 3 Comstock, 226.

The case at bar appears to be within the exception thus stated to the general rule, that after the term in which a judgment may be entered, no order affecting it can be made in the same cause. At the time judgment was entered in this court the judgment of the superior court of Cook county, Illinois, was in full force, and defendant had no means of resisting it except by writ of error from the proper appellate court, and that course was pursued. It is a matter arising after judgment which would have been an effectual bar to the action if it had occurred during the pendency of the suit. Obviously defendant is entitled to relief in some form of proceeding, and a motion will answer the purpose as well as any other.

It is conceded that the ultimate facts on which defendant's liability depends must be examined. It is not enough that the judgment of the superior court of Cook county, Illinois, has been reversed, but we must in some way ascertain whether defendant is liable to plaintiff in the sum for which judgment has been given against him. Cases have arisen in which it was thought necessary to require a defendant in a judgment at law to seek relief in equity from such judgment.

Where the facts are numerous and complicated the propriety of that course will be apparent.

In other cases it may be necessary to frame an issue for a jury in order to determine the liability of the defendant. *Cooley* v. *Gregory*, 16 Wis. 303.

Upon any information we now have in the case at bar it will not be necessary to resort to either of these proceedings. According to the opinion of the Illinois court the matter in issue between the parties is the effect of a discharge in bankruptcy on plaintiff's demand. That matter will be heard in the superior court of Cook county, Illinois, and we can await the decision of that court without putting the parties to the expense of another trial here. Meanwhile all proceedings on this judgment will be stayed, with leave to defendant to renew his motion to vacate our judgment if he shall be successful in the court of Illinois. If this measure of relief shall not be adequate to the protection of defendant's rights, he may be compelled to go into equity; or, if he has anything further to suggest in this proceeding, he will be heard after notice to plaintiff.

M. B. Carpenter, for defendant.

S. P. Rose, for the plaintiff.

Rogers *v.* Marshall.

(District of Colorado. January, 1883.)

1. Practice — Rehearing, Effect of.— When a rehearing is granted for the reason that the court, upon the pleadings and proofs as they stood at the hearing, is inclined to doubt the correctness of the decree, it is the proper practice to set aside such decree until the case is again heard. It would be otherwise if rehearing was granted in order to allow additional proof. In the latter case the decree should stand pending the rehearing.

McCrary, *Circuit Judge.*—This case was heard at the October term, 1881, upon final proofs, and, as the result of that hearing, an interlocutory decree was entered setting aside a conveyance from complainant to respondent, James Y. Marshall, of certain mining property, and referring the case to a master to take proofs respecting profits received by said Marshall from the mine in controversy after said sale. Soon after the entering of this decree, and during the same term of court, a petition for a rehearing was presented on behalf of the respondents. The court granted this petition and set the same down for rehearing at Keokuk in July last. The application was based (1) upon the record as it stood at the former hearing; and (2) upon the ground of newly discovered evidence. At the time and place above named the parties appeared, and the whole case was exhaustively reargued, both upon the original record and proofs, and upon the alleged newly discovered evidence. The application for rehearing upon the ground of newly discovered evidence was overruled. The application for rehearing upon the record as it stood at the former trial was sustained, and the case was reopened for further consideration upon certain questions stated in the opinion. The court being of the opinion, upon reconsideration of the whole case, that the interlocutory decree ought not to have been entered, made an order setting the same aside, which order was entered of record in term time.

It is now insisted, upon the part of the complainant, that the court had no power to set aside the interlocutory decree, but is bound to let the same stand until the final hearing upon further proof.

If the court had merely reopened the case for the purpose of letting in newly discovered evidence, it would certainly have been very improper, and probably erroneous, to have set aside the interlocutory decree pending such further hearing; but where the court grants a rehearing upon the record as it stood at the first hearing, and, as a result of that re-

hearing, reaches the conclusion that an interlocutory decree previously entered was not justified by the proof as it stood, it is not only the right, but the duty of the court to set it aside, although it may be that, upon further showing, the complainant may be able to make a case which would justify the granting of the same relief by another decree. The question in such a case is, was the interlocutory decree right upon the record as it stood when the same was entered, and at the time of the rehearing? This rule was distinctly laid down in the case of *Fourniquet* v. *Perkins*, 15 How. 82. In that case the court proceeded to a hearing upon the final proofs, and passed a decree in favor of the complainants, vesting in them certain real property, together with the gains thereof, and referring the case to a master in chancery to take and report an account. The account having been taken and stated by the master, certain exceptions were filed to his report. At the argument upon the exceptions, the court reconsidered its opinion upon which the interlocutory decree was entered, and dismissed the bill. The case was taken by appeal to the supreme court, where objection was made to the decree of dismissal, because it was made at the argument upon the exceptions, and was contrary to the opinion upon the merits expressed by the court in its interlocutory order. Chief Justice Taney delivered the opinion of the court, and said (p. 85) on this point:

"But this objection cannot be maintained. The case was at final hearing at the argument upon the exceptions, and all of the previous interlocutory orders in relation to the merits were open for revision, and under the control of the court. This court so decided when the former appeal, hereinbefore mentioned, was dismissed for want of jurisdiction. And if the court below, upon further reflection or examination, changed its opinion after passing the order, or found that it was in conflict with the decision of this court, it was its duty to correct the error."

It follows, from this ruling, that, if the present case had

come before the court upon the report of the master, stating an account and exceptions thereto, it would have been competent at that stage of the proceeding to reconsider the interlocutory decree upon the original proofs, and set the same aside. Of course the power of the court was the same when the application for rehearing was made pending the accounting, and before the report of the master. By reference to the opinion filed upon the rehearing, it will be seen that I am not satisfied, from the proof as originally submitted, that the complainant had title to the mine in question which she conveyed to Marshall. The interlocutory decree proceeds necessarily upon the assumption that complainant was the owner of the full undivided interest in fee which she undertook to convey. With this point unsettled, and with a strong inclination, upon the proof as it stands, to hold adversely to the complainant, it was manifestly my duty to set aside the interlocutory decree, and leave the parties in the positions they severally occupied at the commencement of the suit—at least until the complainant shall make a stronger case than that which now appears. The court cannot be expected to adhere to an interlocutory order setting aside the conveyance, and making other provisions equivalent to the appointment of a receiver, after its attention is called to facts appearing in the record which, to say the least, render the right of complainant to such a decree extremely doubtful. It is said that the argument at Keokuk in July last was upon the question whether the respondents should be allowed a rehearing, and not upon a rehearing. I do not so understand it. The petition for rehearing was granted almost as a matter of course, in so far as it was based upon the record as it originally stood, and the case was set down for reargument at Keokuk at the time named. At that hearing the whole case was elaborately reargued, and I certainly should not have given it the time and attention I did if I had understood that it was simply an application for leave to be reheard. Under the circumstances, if I were to take the

view suggested by complainant's counsel, I should certainly not desire to hear the same argument over again, and, therefore, the rehearing would be a mere matter of form.

The motion to vacate the order setting aside the interlocutory decree, and allowing defendants to file further answers, must be overruled, and it is so ordered.

CLARK *v.* BLAIR.

(District of Nebraska. January, 1883.)

1. PRACTICE — REHEARING AFTER INTERLOCUTORY DECREE.— It is competent for a court of equity, at any time before the signing of final decree, to reconsider and modify or set aside any of the interlocutory rulings or orders made in the course of the proceeding; and where a case has been referred to a master, the final hearing is when the master's report comes in and is considered on exceptions.
2. FORMER ADJUDICATION — HOW FAR CONCLUSIVE.— Where the former suit was based upon the same facts as the later one, and was between the same parties or their privies, but to enforce a different demand and obtain another form of relief, the parties are conclusively bound, not by all that might have been litigated in the former suit, but by what was in fact litigated and decided therein.
3. SAME — DECREE OF DISMISSAL.— Where, in the former suit, there was a decree dismissing the bill, it will be presumed, in the absence of proof, that the bill was dismissed because the court held upon some ground that the complainant had failed to make out a case for relief.
4. SAME — EVIDENCE ALIUNDE.— In such a case it is competent to prove, by evidence *aliunde* the record, what questions were in fact contested and decided, if, under the pleadings, several questions might have been litigated and the case might have turned upon any one of them.
5. SAME — SAME — RULE IN ABSENCE OF PROOF.— In the absence of such evidence the court will consider the former adjudication as conclusive upon the parties only as to questions which are common to both suits, and which were necessarily tried and determined in the former.

6. SAME — SAME — EFFECT OF PROOF. — If the evidence in a second suit between the same parties is sufficient to entitle plaintiff to recover, his right cannot be defeated by showing a judgment against him in any action where the evidence in the second suit could not, if offered, have altered the result.

On exceptions to master's report.

This is a bill in equity brought to set aside and cancel certain tax deeds executed by the county of Cuming, through its treasurer, to the respondent.

At the hearing upon the final proofs, the court held that the tax sale and deed complained of were void, and that the plaintiff was entitled to the relief sought, but not until he should pay or tender to respondent such legal taxes as the latter has paid upon the land in controversy. The case was accordingly referred to the master to ascertain and report the amount of the legal taxes so paid by respondent.

It was insisted on the former hearing that a decree of the district court of the state of Nebraska, in the case of the *Nebraska Land & Improvement Co.* v. *John I. Blair* and *John Cloke*, county treasurer, which decree was pleaded in bar and offered in evidence, was in law and equity an adjudication of the issues between the parties in the present suit. This defense was overruled at the former hearing and has been renewed and elaborately reargued. Besides this defense, certain questions arising upon the report of the master, and fully stated in the opinion, are now to be considered.

MCCRARY, *Circuit Judge.* — Although the defense of the former adjudication was raised, considered and passed upon at the hearing upon the proofs, yet the same question may be again considered upon exceptions to the master's report. It is competent for the court at any time before the final decree has been signed to reconsider and modify or set aside any of the interlocutory rulings or orders made in the course of the proceeding. The final hearing in such a case as this

is when exceptions to the master's report are considered and passed upon, and if the court is then of opinion that in any of its previous orders it has committed errors, the same may be corrected. *Fourniquet* v. *Perkins*, 15 Howard, 82.

I have accordingly reconsidered, in the light of the thorough reargument of counsel, the question whether the former decree relied upon by respondent is a bar to the present suit.

Although the parties are not identical, I assume that in legal contemplation the parties to the present suit are bound by the former adjudication to the same extent as if they had all been parties to that proceeding. The former suit, however, was brought to obtain a different remedy and secure a different relief from that which is sought in the present case, although the relief sought in the two cases was predicated upon the same facts. The former suit was brought before the tax deed was executed and for the purpose of enjoining its execution, while the present suit is instituted, after the execution of the tax deed, for the purpose of having the same set aside as fraudulent and void. For the purposes of this question, we may say that the present is a suit based upon the same facts and between the same parties or their privies, but to enforce a different demand and obtain another form of relief. It is, therefore, not a case in which the parties are conclusively bound by all that might have been litigated in the former suit. They are conclusively bound only by what was in fact litigated and decided. *Cromwell* v. *County of Sac*, 94 U. S. 351.

The record of the former suit shows that the bill was dismissed. It shows nothing more; but the court will undoubtedly presume that it was dismissed because the court held upon some ground that the complainant had failed to make out a case for relief. In such a case it is no doubt competent to prove, by evidence *aliunde* the record, what questions were, in fact, contested and decided, if, under the pleadings, several questions might have been litigated, and the case

might have turned upon any one of them. We are, however, in the present case, left to the consideration of the pleadings and decree of dismissal alone. From these we are asked by the respondent to assume that the state court decided the taxes in question to be legal, notwithstanding the matters alleged in the bill, and that the sale for said taxes was valid, so that the purchaser would acquire a good title. All this we must assume, in order to hold that the former adjudication is a bar to relief here. We should be very reluctant to assume this, since, to do so, would be to declare that the state court, in the former suit, held that a tax sale may be valid, notwithstanding the grave irregularities, not to say frauds, alleged in the bill, and shown by the proofs in this case. As we have said, where the record is silent, evidence is admissible to show what was actually litigated and determined in the former suit. In the absence of such evidence, we can consider the former adjudication as conclusive upon the parties in the present suit only as to questions which are common to both suits, and which were necessarily tried and determined in the former.

Such is the doctrine laid down by the supreme court of the United States in the case of *Packet Co.* v. *Sickles*, 5 Wallace, 580, where Mr. Justice Nelson, speaking for the majority of the court, said:

"But even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

Upon looking at the record of the former suit, we discover that the defendants therein alleged in their answer as follows:

"And this defendant says that, by reason of the premises, and because the said petition of the plaintiff herein shows neither the payment of said several sums of money and interest, nor contains any offer to pay the same, or any sum of

money whatever, in redemption of the said lands from the said tax sale, or in discharge of the lien aforesaid of this defendant thereon, that the same is wholly insufficient to sustain the claim for relief therein prayed for by the plaintiff, or to sustain this suit or action against this defendant, or any suit whatever. And this defendant, having now answered the said petition as fully as he is advised that it is material that the same should be answered, asks to be dismissed hence with his costs."

This paragraph of the defendant's answer in that case, taken in connection with other allegations showing that defendant had paid certain legal taxes upon the lands in controversy, constituted, under the decisions of the supreme court of Nebraska, a complete defense. *Hallenbeck* v. *Hahn*, 2 Neb. 426, 427; *R. R. Co.* v. *York Co.* 7 Neb. 495; *Wood* v. *Helmer*, 10 Neb. 75; *Southard* v. *Dorrington*, id. 122; *Hunt* v. *Easterday*, id. 166; *Boeck* v. *Merriam*, id. 201.

Some of these cases also hold that equity will not interfere by an injunction to restrain the execution of a tax deed, which, if executed, would be void, on the ground that the remedy at law in such a case is adequate.

It is apparent, therefore, that the district court of Nebraska may have dismissed the bill in the former suit upon either of these grounds, without considering at all the question of the validity of the tax sale then and now in controversy; and it is also apparent that it was not at all necessary for that court to pass upon the question of the validity of said sale. Under such circumstances, we will presume that it did not do so.

We must hold that the former adjudication is no bar to this action, for another reason:

The law is well settled, that if different proofs be required to sustain the two actions, a judgment in one of them is no bar to the other. "If the evidence in a second suit between the same parties is sufficient to entitle plaintiff to recover, his right cannot be defeated by showing a judgment against him in any action where the evidence in the present suit

could not, if offered, have altered the result." Freeman on Judgments, sec. 259.

That the evidence in this case is sufficient to entitle complainant to relief has already been decided. That it would not have availed the complainant in the former action is clear from what has already been said. The suit was to enjoin the execution of a tax deed, and the court was bound by the decisions of the supreme court of Nebraska, according to which the bill was fatally defective, in not alleging an offer to pay legal taxes, and in showing a case where there was a complete and adequate remedy at law.

The proof now relied upon would have been properly excluded in the former case, or, if admitted, would have availed the complainant nothing, because, in that case, there was no offer to pay or refund legal taxes. There is such an offer in the present bill, which makes the proof here both admissible and efficacious.

It results from these views that the plea of former adjudication must be overruled. It remains only to consider the exceptions to the master's report, filed by the plaintiff's counsel. It appears that the only evidence presented to the master to establish the fact that respondent had paid legal taxes were certain tax receipts. It is objected that these do not show that the taxes were legal, and it is insisted that their legality must be established by other and better evidence, showing a substantial compliance with the law. The burden is upon respondent, in order to establish his lien, to show that he has paid taxes for which the land in question was liable, and which the complainant would have been obliged to pay if respondent had not paid them.

It is therefore ordered that the case be referred to Webster, as master, to take further proof and report, on or before the first day of next term, what, if any, legal taxes against the land in controversy have been paid by respondents.

E. Estabrook, for complainant.

J. C. Crawford and *J. M. Woolworth*, for respondent.

BAUM *et al. v.* GOSLINE.

(District of Colorado. January, 1883.)

1. ATTACHING AND JUDGMENT CREDITORS — THE LATTER CANNOT PRORATE WITH FORMER. — In this state attachment writs are not made returnable to terms of court. There is no such class of actions as mentioned in section 116 of the Code of Civil Procedure, and that section is inapplicable. The proceeds of attached property cannot be distributed as provided in that section.

HALLETT, *District Judge (orally).*— September 30, 1882, Abraham Kuh and others brought suit in this court against H. S. Gosline to recover $1,491, alleged to be due to them from the said Gosline for goods sold and delivered.

On the same day they took out an attachment, which was levied on certain goods of the defendant; October 17, 1882, judgment was rendered in this court in that action against the defendant for the said sum of $1,491. In like manner and with the same proceedings, Leopold Simons and others obtained judgment against Gosline for the sum of $1,224. Executions were issued on those judgments, under which the property attached was sold, and the proceeds, after paying expenses, amounting to $2,719, are now in the hands of the marshal.

This term of court was opened on the third day of October, 1882, and it will be observed that the suits above mentioned, in which writs of attachment were issued, were begun before the term. The present case, in which Julius Baum and others are plaintiffs, was begun October 14, 1882, and judgment rendered therein against the defendant October 18, 1882, for the sum of $1,378.50.

No writ of attachment was issued in this suit, but plaintiffs claim that they are entitled to share in the proceeds of the property attached in the other suits above mentioned, under section 116 of the code, which reads as follows:

"In all cases where more than one attachment shall be

issued against the same person or persons and returned to the same term of court to which they are returnable, or when a judgment in a civil action shall also be rendered at the same term against the defendant, who is the same person and defendant in the attachment or attachments, the court shall direct the clerk to make an estimate of the several amounts each attaching or judgment creditor will be entitled to out of the property of the defendant attached, either in the hands of the garnishee or otherwise, after the sale and receipt of the proceeds thereof by the sheriff, calculating such amount in proportion to the amount of their several judgments, with costs, as the same will respectively bear to the amount of the sum received, so that each attaching and judgment creditor will receive his just part thereof in proportion to his demand," followed by directions for distributing the fund.

That section was in the first attachment act of the territory of Colorado, approved October 29, 1861 (first session Territorial Assembly, 210), and it was obtained from the statutes of Illinois. Before it was enacted by the territory of Colorado, it had received a construction in Illinois to the effect that only those creditors who should obtain judgment at the term of court to which writs of attachment were returned or returnable, could share in the proceeds of property attached. *Rucker* v. *Fuller*, 11 Ill. 223.

In the territory of Colorado this section survived the changes made from time to time in the attachment act, until the admission of the state (R. S. 1868, p. 6), when it was incorporated into the code as section 116.

In the practice of the state of Illinois and in the territory of Colorado, writs of attachment and other process for commencing suits were made returnable to terms of court. Under that system of procedure the meaning of the section was well understood. It defined a class of creditors who were entitled to participate in the proceeds of property which should be seized by attachment. They were creditors who had writs of attachment returned and returnable to the same

term of court, and other creditors proceeding by ordinary summons, who might be able to obtain judgment in the same term with the attaching creditor. This is shown by the case from 11th Illinois before referred to. In the code of Colorado there is no such class of creditors. Writs of attachment are not made returnable on any day or at any term of court, and process of summons requires the defendant to answer within a certain number of days after service, so that there are no such creditors known to the courts of Colorado or defined in the laws of the state as are mentioned in section 116 of the code. By their motion plaintiffs allege, in substance, that they are of a class of the creditors of H. S. Gosline who are entitled to share in the proceeds of this property. But it seems that there is no such class under the law, and, therefore, the motion must be denied. In No. 1043, the Exchange Bank against the same defendant, and No. 1066, C. E. Mantz *et al.* against the same defendant, judgments were also entered at this term, and the plaintiffs would be entitled to participate in the distribution if any order of that kind could be made, but the rule must be the same as to all these parties. Section 116 is entirely inoperative in connection with the other provisions of the code, and no order of distribution can be made.

Decker & Yonley, for plaintiff.

No counsel appeared for the other parties in interest.

NEBRASKA CITY NATIONAL BANK *et al. v.* NEBRASKA CITY HYDRAULIC GAS LIGHT & COKE CO. *et al.*

(District of Nebraska. January, 1883.)

1. TRUST—CONTRACT.—Where a party has in his hands a fund set apart by agreement as a trust fund to be paid to another, a court of equity has jurisdiction to compel the execution of the trust; but where a vendor of property retains as part of the purchase price the

amount of an incumbrance upon the property which he agrees to pay, this does not constitute a trust relation, but only the relation of debtor and creditor.

2. CONTRACT — PRIVITY. — An agreement by a vendee, with a vendor, to pay to a third party an incumbrance upon the property sold, is not a contract upon which such third party can sue. *National Bank* v. *Grand Lodge*, 93 U. S. 123.

3. STATUTE OF LIMITATIONS — BONDS AND COUPONS. — The fact that the failure to pay the coupons attached to a bond within six months from their maturity, gave the holder of the bond the option to sue for both principal and interest, does not of itself cause the bonds to mature at the date of such default, or at the expiration of said six months, so as to cause the statute of limitations to begin to run.

4. JURISDICTION — CITIZENSHIP. — The fact that one of several complainants in a suit to foreclose a mortgage is a citizen of the same state with the defendants, does not present a question of jurisdiction going to the whole case. The court may dismiss the bill as to such complainant and retain it as to others, unless he is a necessary party.

This is a demurrer to a bill in equity. The facts alleged in the bill are briefly and in substance as follows:

The plaintiff bank is organized under the national banking act. The other plaintiffs are all citizens of states other than Nebraska except James Sweet, who is a citizen of that state.

The defendants are all citizens of Nebraska. On the first of October, 1872, the gas company issued twenty-eight bonds for $1,000 each, payable on the first of October, 1882, with interest at the rate of ten per cent. per annum, payable semi-annually as provided by coupons attached to the bonds. There was a further provision that if any instalment of interest falling due remained unpaid for six months the whole debt should become due. To secure these bonds the gas company executed its mortgage to J. Sterling Morton and George W. Meeker as trustees, conveying all property and works of the company. On the first of October, 1876, the company made default in payment of its interest coupons falling due on that day.

The plaintiffs respectively hold some of the bonds secured by said mortgage, and in the aggregate they are the owners

of twenty-five of them. The trustees refuse to execute the trust. Upon these allegations complainants pray for a decree for the foreclosure of the mortgage and sale of the mortgaged premises.

The bill further alleges as follows: In 1874 the firm of Connor & Son were the owners of $86,000 of the gas company's stock, and by virtue of such ownership had control of its affairs. They sold said stock to Metcalf, Hill, Morrison, Morton and the Pinneys (who will hereafter be referred to as Metcalf and associates), for $43,000, but "in carrying out said agreement the said co-respondents required of the said Connor & Son to deduct from the said sum of $43,000 the entire indebtedness of the said Hydraulic Gas Light & Coke Company, including the above described bonds, and that the said Connor & Son, in order to dispose of their said stock, they being at that time financially embarrassed, and being pressed by their creditors, consented to such appropriation of the purchase money of and for the said stock then owned by them, and that in truth and in fact the above named co-respondents only paid to the said Connor & Son for $28,000 worth of stock in said company, which they then received, and have ever since held, the difference between the total indebtedness of said company (or what the same could be discounted for), and the said sum of $43,000, the agreed price thereof; that the balance of said agreed price remained in the hands of the above named co-respondents as a trust fund from which to discharge said indebtedness of said company, and especially the above mentioned indebtedness of your orators, and so far as the above mentioned bonds are concerned, the same still remains in their hands."

The prayer is, that the alleged trust fund be brought into court and be distributed among the bondholders, and that the usual decree of foreclosure and sale be entered, and, for any deficiency remaining after the sale of the mortgage premises, and the application of the proceeds to the mort-

gage debt, judgment be rendered against said confederates.

There is a demurrer filed on behalf of Metcalf and associates, and also a separate demurrer by Nelson Pinney, one of the said associates, which, taken together, raise the following questions:

First. Whether the allegations of the bill, taken as true, show that the complainants are entitled to the relief prayed as against Metcalf and associates.

Second. Whether the court is deprived of its jurisdiction by reason of the fact that Sweet, one of the complainants, is a citizen of Nebraska.

Third. Whether the bill is multifarious.

Fourth. Whether the court is barred by the statute of limitations of Nebraska.

McCrary, *Circuit Judge.— First.* The allegations of the bill, taken as true, show that complainants are entitled to a decree of foreclosure, as prayed.

Second. If the bill, fairly construed, charges that respondents, Metcalf and associates, who purchased the stock of the gas company, have in their hands a fund set apart by agreement as a trust fund, to be paid to complainants on account of the sum due on their bonds and mortgage, then a court of equity has jurisdiction to compel said Metcalf and associates to make such payment to the extent of the funds so in their hands.

If, however, the allegation is that the said Metcalf and associates agreed with Connor & Son to pay the sum due on the bonds of complainants, as a part of the purchase price of said stock, then the bill is demurrable, upon the ground that there is no privity of contract between Metcalf and associates on the one side, and the complainants on the other. *National Bank* v. *Grand Lodge*, 98 U. S. 123.

The allegations of the bill are not as clear and distinct as they should be, and it is, therefore, not surprising that counsel should differ as to whether the creation of a trust fund

for complainants' benefit, or the assumption of a debt, is alleged. If the complainants intend to rely upon the claim stated in their brief, that Metcalf and associates received from Connor & Son a sum certain to be held in trust for the use of complainants, they should so allege with distinctness and certainty. It is not sufficient to allege this as a conclusion arising from the fact that said Metcalf and associates retained from the price of the stock a sum sufficient to discharge the debts of the gas company, including the bonds now in suit. The conclusion would result from this, not that Metcalf and associates became trustees, but that they became liable to answer to Connor & Son, in damages, upon their failure to pay the bonds and discharge the mortgage. As the bill stands, it does not sufficiently charge that Metcalf and associates hold in their hands a fund that is, in equity, the property of complainants. They stand, under the allegations of the bill, in a contract relation to Connor & Son, and not in the relation of trustees for complainants. It is not alleged that any particular sum of money was placed as a trust fund in their hands to be paid by them to complainants or to the bondholders. The allegation, in substance, is, that they owed Connor & Son $43,000 for stock purchased, and that they did not pay the whole debt, but paid that sum less the sum retained to meet the debts of the gas company, including the debts now held by complainants. This is the fact alleged. The conclusion derived by the pleader from this fact is, that the balance of the said agreed price remained in the hands of Metcalf and associates, a trust fund from which to discharge the said indebtedness of the gas company. I understand this allegation to mean that the portion of the purchase price of the stock not paid over, and which was retained by Metcalf to meet the debts of the gas company, became, as a *matter of law*, a trust fund in their hands, for which complainants are entitled to proceed against them. It has never, so far as I know, been held, and I think it cannot be maintained upon sound principles, that,

where the vendee of property assumes the payment of indebtedness due from the vendor to a stranger, and deducts the amount thereof from the purchase price, he thereby becomes a trustee for such stranger for the amount of such indebtedness. To make him a trustee, there must be a deposit with him of a sum of money, to be held by him for the creditor, or an express agreement on his part to assume the duties and the responsibilities of a trustee. There is no resulting trust in such a case as this.

Third. The plea of the statute of limitations must be overruled. The bonds sued on were not due until 1882, and the fact that the failure to pay the coupons within six months from maturity gave the bondholder the option to sue for both principal and interest, did not of itself cause the bonds to mature at the date of such default, or at the expiration of said six months, so as to cause the statute of limitations to begin to run.

Fourth. The fact that one of the complainants is a citizen of Nebraska does not present a question of jurisdiction which would go to the whole case, and which can be raised upon demurrer to the whole bill. If, upon further argument and consideration at the final trial, the court shall be of the opinion that complainant Sweet cannot recover because of his citizenship, the bill as to him may be dismissed without prejudice.

Fifth. The view above expressed, with regard to so much of the bill as seeks relief against respondents Metcalf and associates, renders it unnecessary to consider the question whether the bill is multifarious. The demurrer of Metcalf and associates, in so far as it raises the question that there is no privity of contract between the complainants and the said Metcalf and associates, is sustained. In other respects the demurrer is overruled.

S. H. Calhoun, for complainants.

J. M. Woolworth and *C. W. Seymour*, for respondents.

Denver & New Orleans R. Co. *v.* Atchison, T. & S. F. R. Co.

(District of Colorado. July, 1882.)

1. Constitution of Colorado, Art. XV, § 4 — Connecting Railroads. The meaning of the last clause of article XV, § 4, of the constitution of Colorado, which provides that "every railroad company shall have the right with its road . . . to connect with . . . any other railroad," is that such roads are to be connected physically, as distinguished from the business connection between roads which have approximate *termini*. It is a union of tracks admitting of the passage of cars from one road to the other, and not a mere meeting of roads which may admit of continuous traffic in some form. The evident object is the protection of the public, rather than simply to enable corporations to perform their agreement. By the union of tracks it was intended to make the roads practically continuous for all that may come in the course of business between companies friendly to each other; that the companies are to be brought into harmony when they fail or refuse to agree in the due and proper exercise of their public functions as common carriers; and this court will not hold that a bill that alleges that complainant has connected its road with defendant's road, but that defendant refuses to grant complainant equal facilities in conducting business that it grants to a rival road, does not present a case calling for the consideration of a court of equity, and dismiss such bill on demurrer, without first examining such facts as may be developed by proper evidence.
2. Practice — Equity — Preliminary Injunction. — This court will not, however, grant a preliminary injunction in a case like the present, and the motion, therefore, must be denied.
3. Carriers — Not Permitted to Discriminate in Conduct of Business. — The duty of common carriers to give equal service on equal terms, and upon reasonable compensation, to all who may apply to them to carry persons or property, is an established rule of the common law, and is expressly enjoined in the constitution of Colorado. Sec. 6, art. XV.
4. Same — Effect of Such Rule — Public Policy. — This, as a rule of law, must carry with it all that is essential to its due observance and enforcement — as well what is fully expressed therein as all that may arise therefrom by necessary implication. Whatever is inconsistent with it, or with the purposes for which it was adopted, is against public policy and cannot be upheld. It is a rule of conduct for carriers which is designed to give the public the largest use of public

conveyances which may be consistent with the service, and which leaves to carriers only such powers as are necessary to the business.

5. SAME — CONTRACT BETWEEN, TO EXCLUDE COMPETITION, VOID. — A contract between common carriers to apportion the country between themselves, and to refuse to enter into or allow business relations with competing lines, constructed or to be constructed, is in the nature of a conspiracy to grasp commerce and suppress the building of railroads, is in restraint of trade, and therefore void as against public policy.

6. CONSTITUTIONAL PROVISIONS — SCOPE AND EFFECT OF — WHEN SELF-EXECUTING. — The constitution of Colorado imports that railroads in the state are to be operated in conjunction for the convenience of the public, at least to the extent usual and customary between connecting lines in the control of companies not hostile to each other. A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced.

7. THE REMEDY IN EQUITY. — Unlawful and unjust discrimination between railroad companies engaged in the carrying business may be enjoined in equity, in a suit by the party aggrieved against the party practicing such discrimination.

8. INJUNCTION — WHEN GRANTED BEFORE FINAL HEARING. — A preliminary injunction may be granted to preserve existing relations, but will not be granted to compel a defendant to adopt a new course of dealing with the plaintiff.

On demurrer.

Wells, Smith & Macon, for plaintiff.

Thatcher & Gast, for defendant.

HALLETT, *District Judge*. — Article XV, § 4, of the constitution of Colorado reads as follows:

"All railroads shall be public highways, and all railroad companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any designated points within this state, and to connect at the state line with railroads of other states and territories. Every railroad company shall have the right with its roads to intersect, connect with, or cross any other railroad."

In this case discussion has arisen as to the meaning and effect of the last clause of the section, which declares the right of a railroad company to connect its road with any other railroad in the state. Within the knowledge of all persons there are several ways of operating railroads in connection. When the trains of different roads arrive at and depart from the same town, although from different depots, between which it may be necessary to transport passengers and goods by wagon, we say that the roads connect at that place. In the early history of railroads in this country this method was usually pursued and it is still extensively followed; but, as it involves a change of cars for passengers and goods at considerable expense, a more convenient method of proceeding was soon discovered by uniting the tracks and transferring the cars from one road to the other. In this way closer connections have been made between roads forming continuous lines, so that goods may be sent across the continent without breaking bulk, and passengers make long journeys without change of cars. Of the advantages of this method of operating railroads no doubt is entertained in any quarter. It saves time and money and labor, and serves the public much better than the old way. As before stated, however, the union of tracks and the passage of cars from one road to the other is not an essential element of connection, in the ordinary sense of the word, as applied to railroads. All roads which form continuous lines, and admit of continuous traffic over them in any form, are connected, even where there is no union of tracks or connection of trains.

Referring again to the constitutional provision, it is plain that the word "connect" is not used there in the largest sense which it may have when applied to connecting railroads.

The language is, "Every railroad shall have the right with its road to . . . connect with . . . any other railroad." The roads are to be connected physically, as dis-

tinguished from the business connection always existing between roads which have approximate *termini*. It is a union of tracks admitting of the passage of cars from one road to the other, and not a mere meeting of roads which may admit of continuous traffic in some form. This was not denied at the bar, but it was said that defendant had fulfilled its constitutional obligation by permitting the tracks to be joined at Pueblo. In thus referring to and adopting the most intimate relation that can exist between railroads, what was the object of the framers of the constitution? On behalf of defendant it is contended that their object was to confer on railroad companies power and authority to unite their tracks as convenience or interest may demand, but no right whatever can accrue to either company from such union. The roads are to be firmly united, to await the time when the companies may agree in the use of them. In this view the constitutional convention was much concerned to confer a privilege which has always been enjoyed. No one has ever questioned the right of railroad companies to bring their tracks together in any way that may be acceptable to them, and we should not assume that the framers of the constitution have studiously provided for what was never denied. It is true that in the preceding clause of the same section there is a grant of power to corporations organized for the purpose, to build roads and to connect with other roads at the boundary line of the state. But if it should be conceded that there is nothing in that clause which may be enforced against a corporation, the same may not be true of the succeeding clause. The regulations of the constitution respecting railroad corporations are, in general, limitations of the powers of those corporations for the protection of the public interests, and to facilitate the transportation business of the country. In the clause under consideration the right of a road to join on to another is declared, certainly, for the protection of the public rather than to enable corporations to perform their agreement. To say that it is an ena-

bling act only, is to divest it of any useful purpose. It is more reasonable to believe that by the union of tracks it was intended to make the roads practically continuous for all that may come in the usual course of business between companies friendly to each other; that the companies are to be brought into harmony when they fail or refuse to agree in the due and proper exercise of their public function as common carriers. The law abhors a vain thing, and therefore it will not unite tracks upon which no car may pass from one to another, or erect a switch which must be left to rust in its socket forever. The constitution requiring that railroad tracks shall be connected, it follows necessarily that some use is to be made of the roads so united, and this we interpret to be such as is usual and customary with connecting lines throughout the country, and may be said to stand with the public convenience and a due regard for the rights of the corporations interested.

Complainant having built a road from Denver to Pueblo, in this state, has united its track with that of the Pueblo & Arkansas Valley Railroad at the place last named.

The Pueblo & Arkansas Valley Railroad is leased to defendant, and, with the defendant's road, it forms a continuous line from Pueblo to Kansas City, where connection is made with many roads traversing the country at large. It is averred that defendant, thus owning and operating a railroad from Kansas City to Pueblo, refuses to transact business with complainant; that it will not deliver to complainant, to be carried, goods and passengers received on its road, and destined for points on complainant's road, or receive from complainant goods and passengers carried by complainant to Pueblo and destined for points on defendant's road. The defendant transacts business freely with the Denver & Rio Grande Railway Company, a rival in business to complainant, which owns and operates a railroad from Denver to Pueblo and various other points, but refuses to complainant

the same facilities for business in the country at large. Without going over the bill at length, we are satisfied that some portions of the relief therein asked may be allowed. But we are not called upon at present, nor would it be proper, without evidence of the facts, to define the relief to which a party may be entitled under the constitution. Probably complainant is entitled to deal with defendant on substantially the terms accorded by the defendant to the Denver & Rio Grande Railway Company, in so far as such terms agree with the general usage and practice of railroad companies operating continuous lines. What may be possible or practicable in that direction may be better seen and understood when we come to the evidence. While much of this bill is probably without the support of reason or principle, it is believed that other parts of it rest on the firmest foundation. Great, if not insurmountable, difficulties may be encountered in an effort to regulate passenger travel over roads in the management of companies hostile to each other, but in the carriage of goods the obstacle may not be so great. It seems reasonable to us that a consignor should be allowed to select the road over which his goods may be carried without consulting defendant, and there may be other matters in the bill which call for judicial control.

The demurrer will be overruled; McCrary, *Circuit Judge*, concurring.

Subsequently (July 21, 1882), upon motion by the plaintiff for preliminary injunction to enforce the interchange of business pending the action, the court held:

Hallett, *District Judge*.— In this suit plaintiff seeks to establish a right to connect its road at Pueblo with another road operated by defendant, so that passengers and freight may be transferred from one road to the other in a continuous journey over both lines. It is not shown that

plaintiff at any time has enjoyed this right, but it is averred that defendant has refused to recognize it; and therefore the aid of the court is asked.

The object is, not to preserve existing relations between the parties, but to compel defendant to adopt a new course of dealing with plaintiff, as prescribed by the constitution of the state. On demurrer to the bill we had occasion to consider the matters alleged, and it was thought that on proof thereof the plaintiff would be entitled to some measure of relief. But it was not said that such relief could be given in a summary way by preliminary injunction. That proceeding is adopted to preserve the subject of controversy pending the suit, and it has no office to perform in this instance. If, by a course of dealing or by contract, these parties had established such business relations as are recognized by the constitution of the state, we could, perhaps, maintain the *status* by preliminary injunction during the controversy. That was the course pursued in several suits between express companies and railroad companies in this circuit, following the rule that equity will preserve existing rights until the end of the controversy. But nothing of that kind is presented in this suit. Nothing in the way of provisional and temporary relief is asked in the bill, and, if sought, it could not be allowed in that form. The ultimate rights of parties are to be determined upon issue and full hearing, and the controversy in this suit relates only to such rights.

The English cases referred to were upon a statute which I have not been able to find. That statute may give authority to proceed in a summary way, or the practice of the court may be different in that country. With us I think the rule is as I have stated, to use the provisional writ only to maintain the conditions existing at the commencement of the suit, leaving all other matters to be determined by final decree. 2 Story, Eq. Jur. § 861; 1 High, Inj. § 4.

The motion for injunction will not be entertained.

Afterwards, upon final hearing, the following opinion was delivered:

PLEADINGS.

The original bill was filed March 31, 1882, before complainant's road between Denver and Pueblo was finished. Complainant alleged that it was organized in the state of Colorado, with authority to construct a road from Denver to Pueblo in said state; that it was then engaged in building such road, and had in fact built about fifty miles thereof; that a certain other road, known as the Pueblo & Arkansas Valley Railroad, had been built from Pueblo eastward along the valley of the Arkansas river to a junction with defendant's road, at the eastern boundary of the state; that defendant is a Kansas corporation, which owns and operates a road from the junction aforesaid to Kansas City, in the state of Missouri; that the Pueblo & Arkansas Valley road is held by defendant as lessee, and with defendant's road it forms a continuous line from Pueblo to Kansas City; that complainant desires to connect its road with the said Pueblo & Arkansas Valley road at Pueblo, and to operate the same in connection with defendant's line in the transportation of goods and passengers between Denver and Kansas City, and points intermediate, which may be reached by the several roads in connection; that by the usage and custom of railroads in Colorado and elsewhere throughout the United States, passengers and their baggage are transported over connecting railroads on through tickets issued by the several roads so operated in connection, as convenience and safety may require; and goods are sent in car-load lots, and otherwise, each company receiving the money due it for carriage from the company to which the same may be delivered in the course of transportation. The course of business in the transportation of passengers and goods is set forth in detail. Complainant also alleged that, by the constitution and laws of the state of Colorado, it was entitled to connect its road

with the said Pueblo & Arkansas Valley Railroad at Pueblo, and to employ its road in connection with defendant's line in the carrying business between Kansas City and Denver, and other points on the said roads. But that defendant denied complainant's right so to connect its road, and to participate in the transportation of goods and passengers.

The prayer was similar to that of the supplemental bill, which will be given hereafter.

A supplemental bill was filed June 13, 1882, which recited briefly the principal matters of the original bill; and alleged that complainant's road had been completed to Pueblo, and there, under an order of the district court of Pueblo county, a connection had been made with defendant's road, but that defendant still refused to transact any business with complainant. On that subject, and the business relations existing between defendant and the Denver & Rio Grande Railway Company, the bill and the prayer is as follows:

"But, notwithstanding the premises, the said defendant, ever since the completion and equipment of your orator's said railroad, hath refused and still doth refuse to exchange freights and passengers with your orator at the said connection, or to receive from your orator, or transport over its railroad, or the said Pueblo & Arkansas Valley Railroad, passengers, baggage, mails, freights or express freights transported over the railroad of your orator, or to deliver to your orator passengers, baggage, mails, freights or express freights transported over the said Pueblo & Arkansas Valley Railroad, destined for points on the line of your orator's railroad, or in any manner to exchange freights or passengers or do business with your orator; but contriving and intending to injure, defraud and oppress your orator, ever since the completion of your orator's said railroad, hath been wont to and still is wont to deliver at the said city of Pueblo, all passengers, freights, express freights, freight cars, passenger cars and baggage cars transported over its said railroad and destined for the said city of Denver or points beyond the

same, to the Denver & Rio Grande Railway Company, a certain other corporation owning and controlling a railroad parallel to and competing with the railroad of your orator, and extending from the said city of Pueblo to the said city of Denver. And upon information and belief your orator further avers that, ever since the completion of your orator's said railroad, the said defendant hath been and still is wont to receive from said Denver & Rio Grande Railway Company at said city of Pueblo, passengers, with their baggage, freights, express freights, mails, sleeping cars, baggage cars, loaded freight cars and other rolling stock destined for points on and beyond the railroads controlled by defendant as aforesaid, and transport the same over the railroads so controlled by defendant upon through tickets and bills of lading issued by the said Denver & Rio Grande Railway Company; and in like manner to receive at all points upon said Pueblo & Arkansas Valley Railroad and other roads controlled by defendant, passengers with their baggage, freights, express freights, sleeping cars and loaded freight cars, destined for the city of Colorado Springs and said city of Denver, and other points beyond the same, and transport the same over the railroads controlled by defendant to the said city of Pueblo, upon through tickets and bills of lading issued by said Denver & Rio Grande Railway Company or by said defendant, and at the city of Pueblo aforesaid deliver the same to said Denver & Rio Grande Railway Company, to be carried to destination, each of said companies receiving from the other its due share for the transportation of all such passengers and loaded cars and car service transported upon tickets or contracts issued by the other of said companies, monthly; and its due share for the transportation of freights not in loaded cars, daily.

"Nevertheless the defendant refuses to extend to your orator the same privileges aforesaid.

"And upon information and belief your orator further avers that, although divers merchants of the said city of

Denver have applied to the said defendant to cause the goods of said merchants shipped and transported over the said Pueblo & Arkansas Valley Railroad to be forwarded from the said city of Pueblo by your orator's railroad, the said defendant hath refused to comply with the said requests, and intending to injure and embarrass your orator, and to prevent passengers and freights from passing or being shipped over the road of your orator, the said defendant hath published and put in circulation divers public notices to the effect that the said defendant hath made no agreement with your orator for any interchange of through business, and that through tickets by the way of your orator's road will not be honored for passage on the trains of the said defendant, and that all shipments of freights for the city of Denver or Colorado Springs consigned to the care of your orator will be treated as Pueblo local business, and that no authority is given to any one to make contracts or issue bills of lading to Denver or Colorado Springs over your orator's railroad from Pueblo.

"To the end, therefore, that the said defendant may, if it can, show why your orator should not have the relief hereby and by your orator's original bill aforesaid prayed, and that your orator may have the same relief against the said defendant as if the facts hereinbefore stated and charged by way of supplement had been stated in your orator's said original bill, and that the said defendant may be required to exchange passengers and freights with your orator at the connection of your orator's said railroad with the said Pueblo & Arkansas Valley Railroad, and to extend to your orator all the facilities for such exchange which in such case are or hereafter may be usual or customary between railroad companies operating connecting railroads, and to receive from your orator at the said point of connection all passengers, with their baggage, and all mails, freights, express freights, mail cars, express cars, sleeping cars, baggage and passenger cars, and freight cars or other rolling stock destined for points on the said Pueblo & Arkansas Valley Railroad, or

the said Atchison, Topeka & Santa Fe Railroad, or beyond either terminus of either of the said railroads, and transport the same to the destination thereof or to the point of terminus nearest such destination upon the railroads operated or controlled by the defendant, upon the tickets, checks, contracts or bills of lading issued by your orator; and at the said destination to deliver such mails, freights, express freights and cars to the consignee thereof or to the next carrier in the line of transport, and for its due and proportionate share of a reasonable passage and freight money (not exceeding the rate by it charged for the transportation of passengers or freights by it received from any other railroad company or carrier) and for reasonable car service to be paid by your orator upon all cars of the said defendant delivered to your orator, such freight moneys and car service to be fixed in such manner from time to time as the court may direct, such share of said passage money and such car service to be accounted for and paid over by your orator from time to time, and monthly at all events, as your orator hereby offers to do; and your orator's share of said freight moneys to be paid to your orator upon all freights on the delivery thereof by your orator; and also at the said point of connection to deliver to your orator all passengers traveling upon the said Pueblo & Arkansas Valley Railroad who may desire to proceed from the said point of connection by or over the railroad of your orator to points thereon and beyond the same, with their baggage; and also all mails, freights, express freights, mail cars, express cars, sleeping cars, baggage and passenger cars, freight cars and other rolling stock transported over the said Pueblo & Arkansas Valley Railroad, and which may be marked or directed to be shipped or transported over your orator's railroad to points on the line thereof or beyond the same; and that said defendant be perpetually restrained and enjoined from preventing any person desiring so to do from traveling and being transported, with the baggage of such persons, by your orator's trains from the said point of connection with your

orator's railroad; and from preventing any person desiring so to do from traveling and being transported with the baggage of such persons, or shipping freights or express freights, from the said point of connection over the said Pueblo & Arkansas Valley Railroad, or the said Atchison, Topeka & Santa Fe Railroad, or other roads connecting therewith, or with either thereof, to the destination of such persons or freights, upon through tickets, contracts or bills of lading issued by your orator; that said defendant be likewise restrained from delivering to any other carrier, railroad company or person any baggage, mails, freights, express freights, mail cars, express cars, passenger cars, baggage cars, sleeping cars, freight cars, or other rolling stock, checked, marked or directed to be shipped by or over your orator's said railroad; and from preventing such baggage, mails, freights, express freights, mail cars, express cars, passenger cars, baggage cars, sleeping cars, freight cars or other rolling stock from being delivered to your orator at the said point of connection; and from demanding or receiving for transportation over said Pueblo & Arkansas Valley Railroad and said Atchison, Topeka & Santa Fe Railroad, or either thereof, or the branches thereof, or roads connecting therewith controlled by the defendant, for the transportation of passengers or their baggage, mails, freights, express freights, mail cars, express cars, baggage cars, passenger cars, sleeping cars, freight cars or other rolling stock which may have been transported over, or may be destined for, your orator's railroad, any unreasonable fares or freights, or any greater fare or freight than upon and for the transportation of passengers, baggage, mails, freights, express freights or rolling stock received from or destined for any other railroad for or between points reached by your orator or your orator's said railroad, and other carriers connecting therewith; or any greater rate than is or shall be charged by said defendant for transporting such freight, passengers, baggage, express freights and cars if sent by any other line;

or any greater rate or sum than the fair and proportionate share of the reasonable passage or freight money fixed and determined by, or under the direction of, this honorable court; or that your orator may have such other and different relief, or such further relief, as to your honors may seem meet."

The answer denies the bill fully, and refers to a contract which is sufficiently described in the opinion of the court.

OPINION.

HALLETT, *District Judge.*— The duty of common carriers to give equal service on equal terms and upon reasonable compensation to all who may apply to them to carry persons or property, is as well established as any rule of common law. As to railroads it is expressed in sec. 6, art. XV, of the constitution of this state, in the following language:

"All individuals, associations and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager or employee thereof, shall give any preference to individuals, associations or corporations in furnishing cars or motive power."

As a rule of law, it must carry with it all that is essential to its due observance and enforcement. It is good for what is fully expressed in it, and for all that may arise therefrom by necessary implication. Whatever is inconsistent with it, or with the purposes for which it was adopted, is against public policy, and cannot be upheld. It is a rule of conduct for carriers which is designed to give the public the largest use of public conveyances which may be consistent with the service, and one which leaves to carriers only such powers as are necessary to the business. Thus the carrier may charge for his services, because he cannot work without pay; but he is allowed only a reasonable price, such as will be fair com-

pensation for his labor; he may exclude from his carriage explosive compounds which may be dangerous to other goods and the carriage itself; he may also exclude thieves and gamblers and other mischievous persons who may be traveling for an unlawful purpose. These and the like things, for the good of the service, the carrier may do, but in general he must have regard for the public interest in all that he does; for, as said by the supreme court, "he is in the exercise of a sort of public office, and has public duties to perform from which he should not be permitted to exonerate himself without the assent of the parties concerned." *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 382; *Munn* v. *Illinois*, 4 Otto, 130.

If, then, a common carrier can set no limits to the service in which he is engaged except such as are inherent in it, the position of the defendant in this controversy is made plain. The defendant refuses to carry to or from Denver and points between Denver and Pueblo, except in connection with the Rio Grande road; not absolutely indeed, but for the price charged in connection with that road. To say to the public that the rate shall be less by the Rio Grande road than by any other line is, in effect, to say that the public shall use that road only. A very little difference in the tolls will prohibit traffic over other lines; and clearly enough such was the effect in this case. It is admitted that defendant refuses to carry in connection with complainant at the same rate of charges as with the Rio Grande Company, and that it charges for such carriage a much higher rate; for all practical purposes that course of proceeding amounts to a refusal to carry except in connection with the Rio Grande road.

In support of its refusal to deal with complainant as a connecting road, defendant avers that it has entered into a contract with the Rio Grande Company for making a "through line" and doing "through" business between the Missouri river and Denver, which is of great advantage to defendant, and which cannot be maintained, except on the theory of

exclusive dealing between the parties thereto. So understood, the contract is open to the objection that it gives no choice of route to travelers and shippers of goods, of which something will be said hereafter. The answer, however, gives no intimation as to the true character of the contract as it appears in evidence. It is an agreement between the Union Pacific Company of the first part, the defendant and its leased lines of the second part, and the Rio Grande Company of the third part, for a division of territory and traffic in Colorado and New Mexico. At the time it was made, March 22, 1880, these companies owned or controlled all the railroads in Colorado and the northern half of New Mexico, and they assume in this agreement to divide the country and to allot to each of the parties its separate portion for the purpose of building new railroads. The parties are severally bound not to trespass on the territory of other parties as defined in the agreement, and each stipulates with the other that it will not "voluntarily connect with or take business from or give business to any railroad which may be hereafter constructed" in the territory of the other. After settling the question of new roads, the parties proceed to a division of traffic in paragraphs four, five and six of the contract, as follows:

"*Fourth.* All traffic to and from the Missouri river, and all competitive local traffic, both passenger and freight, to and from the territory south and west of Denver, reached and covered by the Denver & Rio Grande Railway Company or the Denver, South Park & Pacific Railroad Company, and lines controlled or constructed or to be constructed by them, or either of them, or promoted by and connected with them, or either of them, shall be pooled between the Union Pacific Railway Company and the Atchison, Topeka & Santa Fe Railroad Company, one-half to each. Also all traffic to and from the Missouri river, and to and from competitive local points, both freight and passenger, to and from Denver, shall be divided, three-quarters to the Union Pacific Railway Com-

pany, and one-quarter to the Atchison, Topeka & Santa Fe Railroad Company, each company in each case to deduct forty per cent. as cost of operating; it being understood and agreed that all local business, both passenger and freight, to and from the Denver, South Park & Pacific Railroad Company, east of and including Weston station, shall be treated as Denver business, and divided accordingly. It is also understood that the party of the third part is not to do any through business to and from Trinidad, or to and from New Mexico *via* Trinidad or El Moro.

"*Fifth.* That as long as the parties of the second part, and each of them, shall keep the agreements on their behalf herein contained, one-half of all the traffic, both passenger and freight, originating in Colorado, and also in New Mexico at points as far south as the party of the third part is authorized to build under article two of this agreement, and coming or delivered to the party of the third part for transportation over any of the lines of the party of the third part, constructed or to be constructed or promoted by it, or coming or delivered to it for transportation from lines connecting with it, and destined for points east of the line between Denver and El Moro, and said line extended northerly and southerly, shall be delivered at South Pueblo for transportation over the railroads controlled by the parties of the second part, and the other half at Denver for transportation over the railroads controlled by the party of the first part, as far as the party of the third part can legally control such traffic. It is further agreed that, as to all traffic, both freight and passenger, interchanged between the party of the third part and the other parties hereto, to and from Denver *via* South Pueblo, and from and to South Pueblo *via* Denver, the party of the third part shall be entitled to and shall prorate with the other parties at the rate of one mile and a half to one; that is to say, shall be entitled to and shall share in the distribution of such total fare and freight moneys for each mile of actual haul done by the Denver &

Rio Grande Railway Company, as if the same were carried by it one mile and a half, but the allowance of extra mileage shall in no event exceed local rates, and in case of any more favorable *pro rata* being given to the party of the first part, the same shall be given to the party of the second part. It is further agreed that the rates between South Pueblo and Leadville, and between South Pueblo and all other points west of Pueblo, shall be as low as between the same points and Denver, under any and all circumstances, and the party of the third part shall not discriminate against the parties of the second part in respect of cars or other facilities for transfer of freight or passengers.

"*Sixth.* In order to enable the party of the third part to carry out its obligations under the above article, and for its protection, it is further agreed that the parties of the second part shall, as long as the party of the third part shall keep the agreements on its part herein contained, deliver at South Pueblo for transportation any traffic, passenger or freight, destined from points east of the said line of the party of the third part to points on its line constructed or to be constructed or promoted by it, or connecting with it in Colorado, and also in New Mexico to points on its line as far south as the party of the third part is authorized to build under article second of this agreement, and shall not deliver to, or cause the same to be transported over, or voluntarily receive the same from any other line of railroad in the territory named than that of the party of the third part, so far as the said parties of the second part can legally control the same. And that any agreement or understanding of the parties of the first and second parts with each other, or of both or either or any of them with any competing railroad for division of business or territory or earnings that might divert business which would otherwise under this agreement pass over the lines of the party of the third part, shall provide for securing to the party of the third part a proportionate benefit on the mileage basis, stated in article five, for not less than one-

half of the southern and western business, and one-fourth of the Denver business, as provided in article four of this agreement; provided that this shall not prevent the party of the second part from making any agreement or understanding with the Atlantic & Pacific Railroad Company without incurring any liability to the party of the first or third parts."

Of this remarkable document it will not be necessary to speak at length in this connection. To do so would, perhaps, convey an impression that for some purposes these corporations have the powers which in this instrument they have assumed to exercise. It is enough to say that it is a conspiracy to grasp commerce and suppress the building of railroads in two great states. Similar provisions have fallen under the condemnation of other courts whose judgment of them has been clearly expressed. In *Hartford & N. H. Co.* v. *New York & N. H. Co.* 3 Rob. (N. Y.) 411, it was held that a provision in a contract forbidding one of the parties to extend its road would avoid the contract. An association of carriers to regulate the price of freight, with provisions prohibiting the members from engaging in a similar business out of the association, has a tendency to increase the price of carriage and to suppress competition, and is therefore illegal. *Stanton* v. *Allen*, 5 Denio, 434; *Hooker* v. *Vandewater*, 4 id. 349.

The Rio Grande Company also agrees in this instrument, "not to do any through business to and from Trinidad, or to and from New Mexico *via* Trinidad or El Moro;" an express renunciation of a duty enjoined by the state, and therefore void. If that company can decline a part or all of the carrying business at Trinidad, it may also abandon its entire line, and refuse to serve the public in any way. *Shrewsbury & Birmingham Railway Co.* v. *London & Northwestern Railway Co.* 4 De G. M. & G. 415; *S. C.* 6 H. of L. Cases, 113; *State* v. *Hartford & New Haven Co.* 29 Conn. 538; *Union Pacific Co.* v. *Hall*, 1 Otto, 343.

A more objectionable feature of this instrument is that in which the parties agree not to "connect with or take business from, or give business to, any railroad" which may be constructed in Colorado or New Mexico after its date. That is to say, these powerful corporations, having secured a monopoly of the carrying business in two states, will hold it indefinitely, and refuse to recognize or deal with any rival that may enter the field. Argument is not necessary to show that a compact of this kind is against public policy, and therefore void. Certain corporations of Pennsylvania controlling coal produced in a large district of country made a combination to regulate the supply and the price, which was held to be illegal. *Morris Run Coal Co.* v. *Barclay Coal Co.* 68 Penn. St. 173. In this instance the combination is to control the carrying trade of a great country, which is of much greater importance to the people than coal.

It is believed, however, that the true principle mentioned at first should control, without reference to any compact or agreement, valid or otherwise, that may have been made. The carrier service is subject only to conditions and limitations necessary to its existence, and not such as the carrier himself may impose from motives of gain or other purpose. If the defendant may elect to receive goods and passengers at Pueblo from the Rio Grande Company, and to deliver to that corporation alone, other conditions may be added, as that the goods shall be brought in wagons and the passengers on horseback. What right has the defendant to say that goods or passengers shall come to it in one way or another? or that goods and passengers carried by it shall be carried to other points beyond its terminus by one company only? The answer of defendant is, that such arbitrary distinctions are profitable to it, and, therefore, lawful. Its first duty is to its stockholders; and anything that will bring money to its exchequer is permissible. In the courts a different view of the subject prevails.

Twells v. *Pennsylvania Railway Co.* is a case decided in

the supreme court of Pennsylvania, for which the reporter of that court was probably unable to find space in the regular series of reports. The case may not be of interest to the corporations of that state. The opinion is, however, printed in 3 American Law Register, N. S., 728, and, as it is cited by the court in later cases, it seems to be authentic. Defendant's road extended from Pittsburg to Philadelphia, and it had arranged with some other road to carry from Philadelphia to New York, so that it was able to carry through to the latter place from points on its own line. By raising the local rates between Pittsburg and Philadelphia, defendant sought to compel shippers to patronize its through line. As the question is stated by the court, defendant said to plaintiff, "Employ us to carry your oil, not only over our road to Philadelphia, but thence to New York. If you do not, we will exact from you, for its carriage to Philadelphia, six cents per hundred pounds more than we demand from all others who employ us to transport similar freight only to Philadelphia; or, if you will employ us to carry it to New York, after it shall have reached Philadelphia, we will carry it to Philadelphia for six cents less per hundred pounds than we are accustomed to charge others for similar transportation." And the court then adds: "No one will maintain that they can lawfully make such a stipulation for the benefit of a third party, *e. g.*, one of two other carriers. They cannot say to a shipper at Pittsburg of any domestic product, 'You have freight destined to New York. You must send it over our road to Philadelphia. If, when it arrives there, you will forward it by A to New York, we will carry it over our line at certain rates. If you send it by any other than A, our charges will be higher.' This is a discrimination that cannot be allowed. Conceding it, would put in the power of the defendants a monopoly of the carriage of all articles which pass over their road from either terminus to every place of final delivery. The oppressive effects of such a rule are the same, whether its motive be to benefit third parties

or the railroad company itself. Of the transportation along the line of their road, the defendants practically have a monopoly. It is not consistent with the public interest, or with common right, that they should be permitted so to use it as to secure to themselves superior and exclusive advantages on other lines of transportation beyond the ends of their road." The court cites *Baxendale* v. *Great Western Railway Co.*, 1 Neville & McNamara, 191, which clearly supports the view expressed. That case is said to be reported in 5 C. B., N. S., 309, and other English books, as in Neville & McNamara.

So, also, a carrier cannot refuse to receive a passenger on the ground that his coach connects with another which extends the line to another place, and he has agreed with the proprietors of such other coach that he will not receive passengers from such place unless they come in his coach. *Bennett* v. *Dutton*, 10 N. H. 481. On the same principle a railroad cannot elect to deliver grain at one warehouse on the line of its road to the exclusion of other warehouses. *Chi. & N. W. Railway* v. *The People*, 56 Illinois, 365. Or to deal with one express company to the exclusion of other express companies. *Sandford* v. *P. R.* 24 Penn. St. 378; *New England Express Company* v. *Maine Central R. R. Company*, 57 Maine, 188. These cases are sufficient to show the weight of authority in support of the rule as stated, that a carrier cannot hamper or limit his duty to the public except in matters essential to the service.

The opposite view has secured recognition from some eminent judges, as in *Jencks* v. *Coleman*, 2 Sumner, 221, but great names do not prevail against great principles, and should not be allowed to do so in this instance.

In all that has been said, the right of the defendant to arrange with the Rio Grande Company for a through line to Denver and elsewhere, and to carry in connection with that company, has not been impugned. We recognize the authority of railroad companies to unite in continuous lines for greater facilities in the transportation of passengers and

freight, as established in numerous cases. In fact, the constitutional provision to which we shall presently refer, seems to demand such union. But we maintain the right of travelers and shippers of goods to choose between rival lines of railroads without let or hindrance from the latter. We deny the power of a railroad company in the use of its own road, by discriminating charges or other arbitrary measures, to compel the public to resort to any other road, or adopt any particular course in the transmission of goods or passengers. This proposition stands with the general rule before mentioned, that carriers shall not limit or trammel with arbitrary distinctions the service to be rendered; that all roads shall be open to wholesome competition as declared in the cases in the 4th and 5th Denio, and with the doctrine that the carrier shall follow the instructions of his patrons to the extent of forfeiting his earnings in case of disobedience. *Robinson* v. *Baker*, 5 Cush. 137.

We hold, therefore, that defendant is bound to give to complainant reasonable facilities for the exchange of passengers and freight at Pueblo, as to all who desire to use complainant's line in connection with its own, and for the price of carriage charged to persons who use the Rio Grande road in connection with defendant's road. There is some difficulty in deciding what such facilities shall be. On demurrer to the bill we had occasion to consider the meaning of section 4, article XV, of the constitution, which declares the right of every railroad to connect with every other railroad, and we arrived at the conclusion that the connection mentioned in the constitution is of a business character, involving the interchange of passengers and freight in the manner usual and customary between railroads throughout the country. Objection is now made that the clause referred to is authority to the legislature to pass laws on the subject, but otherwise incapable of enforcement. We have not maintained that the physical connection of tracks provided for could be made without a law to direct the course

of proceeding. In this case it is conceded that the roads are united, and the question is whether any use shall be made of the connection. And we shall not attempt to point out the course of legislation or the limits to which it may extend under that section. Independently of legislative power and action, the clause conveys to us the idea that railroads in this state are to be operated in conjunction for the convenience of the public, at least to the extent usual and customary between connecting lines in the control of companies not hostile to each other. What more may remain for the consideration and judgment of the legislative assembly we are not concerned to know. "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced." Cooley's Con. Lim. 101. Within this rule the section is obligatory on railroads to the extent indicated, if no further.

It is also objected that this construction of the section brings it into conflict with section 8, article I, of the constitution of the United States, which confers on congress the power "To regulate commerce with foreign nations and among the several states." The clause referred to directs what shall be done within the state for the advantage of the people of the state. Whatever the effect may be on interstate commerce, until congress shall act on the subject such regulation is within the authority of the state. *Munn* v. *Illinois*, 4 Otto, 113; *Peik* v. *Chicago & Northwestern Company*, id. 164.

Many witnesses in the service of prominent railway companies were examined as to the course of business between railway companies in the United States in forming continuous lines, and sending freight and passengers over connecting roads. The greater number concur in the statement that such arrangements are the subject of special agreement, as to which the corporations interested claim and exercise the absolute authority of natural persons in the daily affairs

of business. The evidence discloses what is fully known to all who have given any attention to the subject, that as to business intercourse railway companies assume to be absolutely independent of each other. In the strife of competition it is not strange that each should assume to have authority in all things — and yet they do not absolutely refuse to take passengers and freight from each other. In *Bennett* v. *Dutton* (10 N. H.), in 1837, when the carrying business was young, defendant refused to take plaintiff in his coach because the latter had been guilty of riding in a rival coach. But now the managers of railroads are too wise in the law to make such blunders. By discriminating charges, business may be sent in one way or another to avoid a rival line, as well as by refusing to deliver to such line. An illustration not given in the evidence, but within the knowledge of many persons in this community, may be recalled. Not many years ago the Union Pacific road and the Denver Pacific road were in the control of companies hostile to each other. They did not refuse absolutely to deliver freight and passengers to each other, but they could not agree on the rates to be charged by each company; and goods from California consigned to Denver were carried by Cheyenne to Omaha, six hundred miles east of Denver, and then to Kansas City, two hundred miles south, and back to Denver, six hundred and thirty-nine miles. This circuit of more than fourteen hundred miles was made to avoid the use of the Denver Pacific road from Cheyenne to Denver, a distance of one hundred and ten miles, or something like that. If railway companies impose such onerous burdens on the public, it must not be supposed that they have authority of law for it. Returning to the evidence, it sufficiently shows that passengers and freight are freely exchanged between connecting railroads in most cases. This is the rule, and the exception arises when one of the parties conceives that it can make more money by some other course. Obstacles are then made to the continuance of friendly rela-

tions in the way of discriminating charges and the like, and the companies become hostile to each other. Now the right of railroad companies to raise such obstacles in their own interest and against the public interest, is the very matter in issue in this cause. We have endeavored to show that they have no such right, and if we have succeeded, the practice itself is not now in the way of granting relief in this cause. If that has not been shown, further discussion will not avail.

We perceive that there is a difficulty in setting up these companies to be agents each for the other in the sale of tickets for passage over both lines, and for making through contracts binding on both companies for the transportation of goods. But some things may be done without making either company an agent for the other, and without bringing the companies into any relation of contract or agreement as between them. Passengers and their baggage may be delivered at the junction of the roads by each company, to be transported by the other, and goods may be forwarded in car-load lots and otherwise on terms that will not involve any contract made by one of these companies for and on behalf of the other. The defendant accepting the services of other railroad companies in selling through tickets, and making through contracts over its own line in connection with the Rio Grande road, ought not to object to the same company's performing the same service for complainant if they are willing to do so; nor should defendant be heard to say that it will not carry goods or passengers, on the ground that they are to be carried further by complainant from defendant's terminus to some other point. It is, however, unnecessary to discuss in detail the relief to be granted, as that can be well enough expressed in the decree. In this opinion we seek only to define the general rule.

The decree will be for the complainant, but not to the full extent of the prayer of the bill.

McCrary, *Circuit Judge*, concurs.

DECREE ENTERED MARCH 1, A. D. 1883.

This cause came on to be heard at this term of court, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed by the court that the said defendant do from henceforth exchange passengers and freight with the plaintiff at the junction of the plaintiff's railroad with the Pueblo & Arkansas Valley Railroad, near to the city of Pueblo, in the county of Pueblo, as in the bill mentioned, and that each party extend to the other all facilities for such exchange of passengers and freights which are or may be hereafter usual or customary between railroad companies operating connecting railroads, except as hereinafter otherwise provided, and that each company shall cause all regular passenger trains moving upon its railroad to be stopped, upon all trips, at the said junction, and at the platform or depot erected thereat by the plaintiff, a reasonable and sufficient time to enable passengers to conveniently and safely alight from and get upon such trains, and express matter and mails to be delivered therefrom and thereto at the said station; and that the freight trains of each company shall stop at the proper tracks near to the same station whenever the agents of the other company shall signify to those operating such freight trains that there is freight at the said station to be delivered to such train.

Second. And that whenever hereafter merchandise or freight shall be received or come to the hands or control of the defendant in car-load lots or otherwise, or shall at any station upon the roads controlled by defendant be offered to it to be transported over the Pueblo & Arkansas Valley Railroad, or the said railroad and other railroads controlled by defendant, to Pueblo, or to the junction aforesaid, and thence over the plaintiff's railroad to points thereon or beyond the same, and the shipper thereof (or the consignee if no directions thereunto be given by the shipper) shall direct that such freight or merchandise be delivered to plaintiff or

forwarded over plaintiff's railroad, the defendant shall receive and transport the said freight or merchandise from the place of receiving the same to the junction of the Pueblo & Arkansas Valley Railroad with the railroad of plaintiff near Pueblo aforesaid, and there deliver the same to the plaintiff, to be by the plaintiff transported to the destination thereof, or to the point or terminus of the plaintiff's railroad nearest such termination; and that for the transportation of such freight or merchandise the defendant shall be entitled to demand and receive a reasonable freight money not exceeding the rates and sums by the said defendant at the same time wont to be demanded and received for the transportation of like freight from the same initial point or terminus to the city of Pueblo, when the same is or may be delivered or contracted or received by defendant to be delivered to the Denver & Rio Grande Railway Company or any other person or company operating a railroad in competition with the plaintiff; and if the freight moneys for the transportation of such freight or merchandise shall be prepaid wholly or in part, the defendant, after deducting its reasonable charges aforesaid, shall render the residue of said moneys, if any, together with and at the same time with the said goods to the plaintiff.

Third. And that whenever hereafter merchandise or freight shall be received by the plaintiff in car-load lots, or otherwise, to be transported over its said railroad to the said Pueblo, or the said point of junction, and thence over defendant's railroad to points upon or beyond the same, and the shipper thereof (or the consignee, if no directions thereunto be given by the shipper) shall direct that the same be forwarded over defendant's railroad, or delivered to the defendant, the same shall by the plaintiff be transported to the point of junction aforesaid of its said railroad with the Pueblo & Arkansas Valley Railroad, and there be delivered to the defendant to be carried and transported by defendant over the said Pueblo & Arkansas Valley Railroad, or the same

and other railroads controlled by the defendant, to the destination thereof, or to the point or terminus upon or of defendant's railroad nearest such destination, and that for the transportation of all such freight or merchandise the said defendant shall be entitled to demand and receive a reasonable freight money, not exceeding the rates and sums by the defendant at the same time wont to be demanded and received for the transportation of like freight from Pueblo to the same point or terminus when received from the Denver & Rio Grande Railway Company, or from any other person or company operating a railroad in competition with the plaintiff; and that if the said freight moneys for the transportation of such freight shall be prepaid to the plaintiff wholly or in part, the plaintiff, after deducting its reasonable charges in that behalf, as aforesaid, shall render the residue of the said moneys, if any, together with and at the same time with the said goods to the defendant.

Fourth. And that all freights and merchandise by the defendant received to be delivered to the plaintiff, or forwarded over plaintiff's railroad, and all freights and merchandise by the defendant received from the plaintiff to be carried and transported over defendant's railroad, shall be forwarded, carried and transported by defendant at the same speed, and at the same intervals of time, and in like cars, and under like conditions, and with the same conveniences and facilities, as like freights or merchandise marked, consigned or directed to be delivered, or by defendant, in fact, delivered to any other person or company operating a railroad in competition with the plaintiff, or like freights or merchandise by the defendant received from any other such person or corporation operating a railroad in competition with the plaintiff.

Fifth. And that, whenever either company, in the course of said business, shall receive from the other freight or merchandise, loaded in the cars of such other company, and shall use the cars of such other company for the transportation of such freight, it shall be the duty of the company, re-

ceiving such cars of the other, if the same shall be unloaded upon its own line, to return the same with all convenient speed, and without reloading the same, to the owner thereof, and to pay therefor reasonable car service or hire, after the same rate and according to the course of dealing heretofore established between the defendant and the Denver & Rio Grande Railway Company; but if the said plaintiff shall at any time demand of defendant for use upon its said railroad, or to be shipped or transported, with the freight therein, over its said road, a number of cars in excess of the number of cars of the plaintiff then in use on defendant's road, payment of the hire of said cars shall be made by the plaintiff in advance from week to week, at the rate and price aforesaid; and nothing herein contained shall be deemed to require either company to furnish to the other empty cars to be loaded and used by such other company, either upon its own railroad or elsewhere.

That, whenever and so long as the defendant shall be wont to allow its freight cars to pass to and upon any railroad not owned or controlled by the defendant, it shall be required to allow its freight cars of like character to pass to, upon and over the railroad of the plaintiff to the same extent as to pass to, upon and over the railroads of other persons and companies.

That, whenever and so long as the plaintiff shall allow its freight cars to pass to, upon and over other railroads not owned or controlled by it, plaintiff shall allow its freight cars of like character and to the same extent to pass to, upon and over the road of defendant, and, save in the case aforesaid, and to the extent aforesaid, neither of said companies, party hereto, shall be required to allow its freight cars to pass to, upon and over the road of the other party.

Sixth. It is further ordered, adjudged and decreed by the court, that all passengers who shall by the plaintiff be transported over plaintiff's railroad to the junction aforesaid, and who shall desire to be carried from thence over said Pueblo

& Arkansas Valley Railroad, or the same and other railroads controlled by defendant, shall by defendant, at the said junction, be received into the trains of defendant, and therein carried and transported, with their baggage, to the destination of such passengers, or to the point or terminus of or upon the roads controlled by defendant nearest to such destination; and that all passengers upon defendant's railroad, and persons who shall desire to be carried over defendant's railroad to the said junction, and to proceed thence over plaintiff's railroad, shall by defendant be carried and transported over the said Pueblo & Arkansas Valley Railroad and other railroads controlled by defendant, and delivered, with their baggage, at the said junction of the plaintiff's railroad with the said Pueblo & Arkansas Valley Railroad, and that, for the transportation of such passengers, with their baggage, defendant shall be entitled to demand and receive the same fare and sum by the defendant at the same time wont to be demanded and received for the transportation of passengers of the same class, and their baggage, from said city of Pueblo to the same other point or terminus on the railroad of defendant, or from the same other point or terminus on the railroad of defendant to said city of Pueblo, when the said passenger is by defendant received from or carried in connection with the Denver & Rio Grande Railway Company, or any other person or corporation controlling a railroad in competition with the plaintiff, and no more; and that all passengers traveling over the road of plaintiff, from any point or place thereon to the said junction, and desiring to proceed from the junction aforesaid over the roads controlled by the defendant, shall receive from the plaintiff a certificate setting forth that such passenger is entitled to proceed from said junction, over the road of the defendant, at the rates and fares above prescribed, and that all passengers traveling upon the road of the defendant, from any point or place thereon to said junction, and desiring to proceed from said junction over the road of plaintiff, shall receive from the defendant a

certificate setting forth that such passenger is entitled to proceed over the road of the plaintiff at the rate and fare aforesaid; *provided*, nevertheless, that whenever and so long as the said defendant and the Denver & Rio Grande Railway Company shall be wont to insert in the passage tickets by the said companies respectively sold for passage over their railroads in connection, any limitation of the time within which the passage on said ticket shall be made, the parties hereto, and each of them, shall insert in the certificates hereby above required to be issued to passengers the like limit of time, and the passenger receiving such certificate shall be entitled to passage, by virtue thereof, only where the same is presented and used within the said limit of time; but nothing in this provision shall prevent either company from issuing such certificates without limitation of time, and passengers receiving the same shall be required to pay after the same rate as when traveling upon an unlimited ticket upon the roads of defendant in connection with the road of the Denver & Rio Grande Railway Company.

Seventh. It is further ordered, adjudged and decreed by the court, that passengers traveling over plaintiff's railroad and the railroads controlled by defendant, upon tickets issued by any other railroad company, or otherwise, shall be entitled to travel upon the same trains and in the same cars, and shall be entitled to the same facilities, conveniences, attention and privileges as passengers of the same class traveling upon tickets issued for travel over defendant's railroad and the Denver & Rio Grande Railroad, or the railroad of any person or corporation operated in connection with the railroads controlled by defendant, and in competition with plaintiff's railroad; but this shall not be construed to entitle either company to run its trains over the railroad or railroads controlled by the other company, nor to require or entitle either company to operate the passenger cars of the other company upon its railroad.

Eighth. It is further ordered, adjudged and decreed by

the court, that if the defendant company doth or shall at any time decline to employ or authorize any other person or corporation controlling or operating a railroad to sell tickets or to issue through bills of lading over the railroads controlled by defendant, and shall refuse to recognize passage tickets or bills of lading issued by any such person or company, said defendant shall not be required to honor any such passage ticket or bill of lading issued by any such person or company over the roads controlled by defendant in connection with the plaintiff's road, nor to transport any passenger or his baggage, or any freights or merchandise, over the roads controlled by defendant upon passage tickets or bills of lading issued by such other person or company.

Ninth. But whenever and so long as the defendant is or shall be wont to honor the passage tickets, bills of lading or other contracts of carriage issued by any other company, over the railroads controlled by defendant, or any part thereof, in connection with the Rio Grande Railroad, and to transport passengers and freights thereon, it shall honor the passage tickets, bills of lading and contracts of carriage issued by the said company over defendant's road and the railroad of plaintiff, and carry and transport passengers and their baggage upon such tickets, and freights upon such bills of lading or contracts of carriage.

Tenth. It is further ordered, adjudged and decreed by the court, that where, in any case, in the transaction of the said business in connection, either company shall have received and transported freights or merchandise over its railroad, or the same, and roads in connection therewith, upon which the freights earned by such company, or any charges advanced by such company, remain unpaid in whole or in part, such company shall be entitled to demand from the other company all such freights and charges remaining unpaid in respect to such freight or merchandise at the time of the delivery thereof.

Eleventh. Whenever, and so long as either company, party

hereto, is wont to receive, without prepayment of freights or charges thereon, freights or merchandise to be transported over its railroad, and any other railroad operated in competition with the railroad of the other company, party hereto, such company shall be required to receive like freights without demanding prepayment of freights or charges thereon when offered for transportation over its railroad in connection with the railroad of the other company, party hereto, but save in the cases aforesaid, neither of said companies shall be required by virtue hereof to receive or transport freights or merchandise without prepayment of freights and charges thereon, and neither company shall be required to accept for transportation over its road freight upon which the charges have been prepaid to the other, unless the proper portion of such prepaid charges be rendered to the company to which the said freight is offered, together with, and at the same time with, said freight.

Twelfth. It is further ordered, adjudged and decreed by the court, that each company shall, at the said junction, receive freights and passengers and their baggage, and sell passage tickets to all those desiring to proceed thence, over the roads of said companies respectively, and each company shall there check the baggage of passengers purchasing tickets over its road, and provide reasonable and proper facilities for the discharge of all duties hereby required to be performed by said companies respectively.

Thirteenth. It is further ordered, adjudged and decreed by the court, that in and about the transaction of the said business in connection, each party shall extend and accord to the other the same privileges, facilities and conveniences in all respects by the same party extended to any person or corporation operating a railroad in competition with the other, without unreasonable or undue discrimination or preference.

Fourteenth. It is further ordered, adjudged and decreed by the court, that if, at any time hereafter, the provisions

herein made for the purpose of carrying out and effectuating the terms of this decree in securing to each the rights herein settled and defined, shall appear to be inadequate, either party shall be at liberty to apply to the court for further directions.

Fifteenth. It is further ordered, adjudged and decreed, that the provisions herein contained, so far as the same are applicable to the defendant, shall extend to all railroads situate in Colorado, Kansas, New Mexico, Texas and elsewhere that are either owned, operated or controlled by the defendant.

Sixteenth. It is further ordered, adjudged and decreed by the court, that this decree, and each and every of the directions herein contained, shall be deemed an injunction upon each of the parties hereto, and, from and after the expiration of thirty days after the entry hereof, the same shall be in force, and all and singular the officers, agents and servants of the respective companies shall, from thence forward, without service thereof, be required to observe and perform the same, under the penalties of a contempt.

Seventeenth. It is further ordered, adjudged and decreed by the court, that so much of the plaintiff's bill as prays the court to fix or prescribe the rates or fares to be charged by the defendant, or to apportion rates or fares between the said parties, be, and hereby is, dismissed without prejudice.

It is further ordered, adjudged and decreed by the court, that the plaintiff recover its costs in this suit expended, to be taxed, and have execution therefor.

Wells, Smith & Macon, for complainant.

George R. Peck and *Thatcher & Gast*, for defendant.

FRANK CLARK, by his next friend, *v.* THE C., B. & Q. RAILWAY COMPANY.

(Southern District of Iowa. January, 1883.)

1. RAILROAD — NEGLIGENCE — INJURY TO PASSENGERS — PLEADING.— The plaintiff, in a suit against a railroad company to recover damages for injuries received while traveling as a passenger on the defendant's cars through the defendant's negligence, is not bound to state, in his declaration, the particular facts constituting the negligence. It is sufficient to state generally that the injury was the result of the defendant's negligence.

Action to recover damages for personal injuries. Motion to make declaration more specific.

The opinion of the court was delivered orally by McCrary, circuit judge, who discussed the requisites of a declaration in such a case with respect to the allegation of negligence. He said in substance: The question is one of pleading, and not necessarily one of evidence. The plaintiff, who was injured while traveling as a passenger on board the defendant's cars, alleges that he was injured by the derailment of the train on which he was traveling, and that the injury resulted from negligence on the part of the defendant, but he does not state in what the negligence consisted. If this were a suit by an employee, it might perhaps be necessary to specify in the complaint the facts constituting the negligence; but there is a material difference between a suit by an employee and a suit by a passenger for personal injury. The latter has, as a general thing, no means of knowing what has caused the accident or injury. He has nothing to do with the operation of the road. He may be only one of a thousand passengers occupying many coaches. He may be so seriously injured as to be unable to inquire into the causes of the accident. He may be killed, and suit may be brought by his representatives. Many reasons suggest themselves at once why it would be a harsh rule to require a passenger who sues for an injury to specify the acts of negligence or the facts

showing want of care on the part of the railroad company. It is accordingly settled, we think, by reason and authority, that it is sufficient to state in the declaration generally that the injury was the result of defendant's negligence. When it comes to the trial the burden is upon the plaintiff to show a *prima facie* case. Whether he does so by showing simply that the car ran off the track, and that he was injured in consequence, is a question which may arise on the trial, but which is not now before us. He must show enough to raise a presumption of negligence on the part of the defendant, but how far he must go in order to do this we need not now determine.

This view is supported by the authority of Thompson's work on Carriers of Passengers, p. 547, sec. 9, and by the cases there cited.

Hagerman, McCrary & Hagerman, for plaintiff.

H. H. Trimble, for defendant.

Davenport National Bank *v.* Henry Mittelbuscher, Collector

(Southern District of Iowa. January, 1883.)

1. Savings Banks — Taxation of Stock — Iowa Statute. — It seems probable that the several statutes quoted in the opinion being construed together, ought to be held to require the stockholders in savings banks to pay taxes upon their shares of stock, at least to the extent that there is no taxation upon the same as against the bank.
2. State Statute — Province of State Court to Construe. — It is the peculiar province of the courts of the state to construe state statutes.
3. Validity of State Law — Duty of Federal Court. — The courts of the United States are very reluctant to place upon a state statute any construction which will bring it into conflict with a statute of the United States, and therefore render it void; and where the question is pending before the state courts, the federal courts will be inclined to await their decision.

4. REVENUE LAWS — RULE OF CONSTRUCTION. — If property which, by a previous statute, is declared liable to taxation, is to be exempted under a later act, the exemption must rest upon some clear and unequivocal provision of the statute.

The facts are sufficiently stated in the opinion.

MCCRARY, *Circuit Judge.* — The complainant is a national bank, located in the city of Davenport, Iowa. The defendant, Mittelbuscher, as tax collector for said city, has demanded of complainant $1,631, as tax levied by said city upon the shares of the capital stock of the bank. The complainant alleges that said tax is an illegal charge against it, and that the same is null and void, because the statutes under which the same was levied are contrary to section 5219 of the Revised Statutes of the United States, which provides that shares of national banking associations shall "not be taxed at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens."

It is alleged that, under the statutes of Iowa, the shares of stock in savings banks are exempt from taxation, while those in national banks are subject thereto, whereby the latter class of property is taxed at a greater rate than the former. Complainant alleges a willingness to be taxed the same as savings banks, and as a reason for not tendering any sum as the tax legally due, it says that, if assessed or taxed under the statutes of Iowa, under which savings banks are taxed, it would have nothing at all to pay as city tax for 1882, because all its capital stock and all its surplus are now, and were during the whole of the years 1881 and 1882, and long prior thereto, invested in non-taxable bonds of the United States government; and because, furthermore, its other personal property, to wit, moneys and credits, are not, and were not during said period, equal to the average amount of debts by it owing.

Counsel have argued very fully the following questions:

1. Does the law of Iowa exempt from taxation the stock of savings banks?

2. If so, is such law void as being in conflict with section 5219, Revised Statutes of the United States?

3. Does it appear from the pleadings and proof that complainant is not liable to pay any tax whatever to the city of Davenport for the year 1882?

The first question is, are shares of the capital stock of savings banks exempt from taxation?

The general provision of the statute of Iowa is very broad and sweeping. It is found in section 813 of the code of 1873, and declares that "depreciated bank notes and the stock of corporations and companies shall be assessed at their cash value." In *Cook* v. *Burlington*, 13 N. W. Rep. 113, it was held by the supreme court of Iowa that the legislature has the power to impose a tax on the shares of stock of a corporation in addition to a tax on the property of the corporation; that this general provision would, if it stood alone, apply to and dispose of this case, is very clear; but the question of difficulty arises upon the construction of section 28 of the act to authorize the organization of savings banks in the state, which is as follows:

"The paid-up capital of all savings banks organized and doing business under this act shall be subject to the same rates of taxation and rules of valuation as other taxable property, by the revenue laws of the state, which taxes shall be levied on and paid by the banks and not the individual stockholders; and the general assembly shall never impose any greater tax upon property employed in banking under this act than is or may be imposed upon property of individuals. The franchise of all such banks, the savings and funds deposited therein, and the mortgages and other securities, wherever the same are invested, are not to be taxed, but are expressly exempted therefrom, and may be omitted from assessments of the banks required by the revenue laws of this state." McClain's Code, page 319.

Does this section, construed in connection with the previous law, exempt the shares in savings banks from taxation?

It provides in the first clause that the paid up-capital of savings banks shall be subject to taxation as other taxable property, and that the tax shall be levied upon the banks and not upon the individual stockholders. Under this provision we suppose the bank is to be taxed upon the capital actually paid in by the stockholders; that is to say, upon the money which as a corporation it actually receives from its stockholders and employs in its business. This is a very reasonable provision, since, to all intents and purposes, the money so paid in is the money of the corporation. Does it necessarily follow that the stockholders are not liable for any taxation upon their stock?

Suppose the stock is not full paid, as, for example, that only fifty per cent. is paid in, and that the stock is worth par, would it be contended in such a case that the stockholder would be liable for no tax? If so, one-half of the actual value of the property would escape taxation altogether. Or suppose it is full paid stock and worth in the hands of the stockholders fifty per cent. above its par value, would not the stockholders be liable to be taxed upon the excess of the value over and above the par value? It seems probable that this statute and the general provision above quoted being construed together, ought to be held to require the stockholder to pay taxes upon his shares of stock, at least to the extent that there is no taxation upon the same against the bank. The section in the second clause provides that the property employed in savings banks shall not be taxed to any greater extent than is or may be imposed upon the property of individuals. The third clause exempts from taxation "the franchise of all such banks, the savings and funds deposited therein, and the mortgages and other securities, wherever the same are invested." This clause evidently does not refer to shares of the capital stock, but (1) to the franchise, (2) the deposits, and (3) to the securities in which the capital is invested. A tax upon the capital paid in is substituted for a tax upon these.

The supreme court of Iowa has never placed a construction upon this section. It is the peculiar province of that court to determine the meaning of the statutes of the state. Until it shall construe the statutes as exempting the shares of stock in savings banks altogether from taxation, we are disposed to hold that it does not do so, especially since to give it the construction contended for would, to say the least, raise a serious question as to its validity. The courts of the United States are very reluctant to place upon a state statute any construction which will bring it into conflict with a statute of the United States, and therefore render it void.

We understand that this question is now before the courts of the state, and we are therefore content to await the authoritative decision of the supreme court of the state. When that tribunal has construed the statutes, we will abide by its construction; and if it be such as to bring the law of the state into irreconcilable conflict with section 5219 of the Revised Statutes of the United States, it will be our duty to declare it void; but if it be held that savings banks are subject to taxation the same as other corporations organized under the laws of Iowa, except to the extent that the property of such banks is expressly exempted, and that therefore the stock is not exempt but may be taxed in the hands of the stockholders according to its cash value, then, of course, the statute will stand as in substantive harmony with the national bank act.

It is now well settled that the shares of stock of corporations generally in Iowa are subject to taxation. *Cook* v. *Burlington*, *supra*. If the stock of savings banks is exempted at all, it must be by the provisions of the section above quoted. As we have seen, it is not clear that such is the effect of that section. It is a sound and well settled rule for the construction of revenue laws, that if property which by a previous general statute is declared liable to taxation is to be exempted under a later act from bearing its proportion

of the public burden, the exemption must rest upon some clear and unequivocal provision of the statute.

The conclusion reached upon the first question renders it unnecessary, for the present at least, for this court to consider the second.

Nor is it necessary to determine the third question discussed by counsel. It may, however, be observed that, in our opinion, the proof fails to show that all the capital stock and all the surplus assets of complainant is and has been invested as alleged in non-taxable bonds of the United States. If the case of the complainant were otherwise made out, it would be necessary to refer the question here suggested to a master for proof. The order is, that there be a decree for respondents for costs, and dismissing the bill.

Mr. Hirchl, for complainants.

Mr. French, for respondents.

WESTERN STAR LODGE No. 2 *v.* PAUL SCHMINKE, Postmaster.

(District of Nebraska. January, 1883.)

1. POSTMASTER — DUTY TO OBEY LAWFUL ORDERS OF THE POSTMASTER GENERAL — INJUNCTION. — A postmaster being an officer subordinate to the postmaster general, is bound to obey the orders of the latter respecting the location of a postoffice within a city, and the courts will not undertake to enjoin him from so doing.
2. POSTOFFICE — REMOVAL FROM ONE BUILDING TO ANOTHER IN THE SAME TOWN OR CITY. — The power to remove a postoffice from one building to another in the same town or city is vested by law in the postmaster general, and can be exercised by him at his discretion.
3. LEASE OF POSTOFFICE BUILDING — POWER OF POSTMASTER GENERAL. — A lease of certain premises for use as a postoffice for a term of four years does not deprive the postoffice department of the power to remove the postoffice during that time.

MCCRARY, *Circuit Judge.* — This is a bill in equity, brought for the purpose of restraining the respondent, who is postmaster at Nebraska City, Nebraska, from obeying an order

of the postmaster general of the United States directing him to remove the postoffice in that city from one building to another.

This relief is sought upon the ground that a removal of the office as proposed would be in violation of a lease executed by the late postmaster general, Horace Maynard, whereby certain premises in which the complainants have an interest were leased for use as a postoffice for a period of four years.

The relief sought cannot be granted for several reasons:

1. The respondent is a subordinate officer of the postoffice department, and bound to obey the order of the postmaster general.

2. The postmaster general is not made a party, and cannot therefore be enjoined in this proceeding, even if it were within the power of the court to control his action in the matter of locating and removing postoffices.

3. The power to remove the postoffice at Nebraska City from one place within the city to another is vested by law in the postmaster general, and can be exercised by him at his discretion.

4. If the lease executed by the late postmaster general to complainant is a valid contract, the complainant is entitled to the stipulated rent for the entire term, and may recover the same by suit in the court of claims, but I know of no other remedy. The law does not authorize the postmaster general to bind the United States by an agreement that a postoffice shall not be removed from a particular building during a period of four years, or any other period. Besides, the lease in question does not show that the late postmaster general undertook to make such a contract, and the answer avers that the lease expresses the whole contract.

5. The contract, such as it is, is with the "United States, by Horace Maynard, postmaster general," and the court has no jurisdiction to grant any relief upon it as against the government.

The exceptions to the answer are overruled.

MILNE *v.* DOUGLASS and others

(Eastern District of Missouri. April, 1882.)

1. COMMON CARRIERS — JOINT CONTRACTS. — Where three railroad companies having connecting lines of road, and a steam-ship company connecting with the terminal line, entered into a contract with A. to transport certain property over their roads and upon said steam-ship company's vessels from X. to Z., and A. suffered loss through the negligence of one of said contracting parties in transporting said property, *held*, that said companies were jointly liable, notwithstanding the fact that the bills of lading under which said property was shipped were signed by the agent of said companies "severally but not jointly," and although said bills of lading provided that "in case any loss, detriment or damage is done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage;" that the liability of said roads should cease upon their delivering said property to said steam-ship company in safety, and although said bills of lading contained the following clause, viz.: "NOTICE. In accepting this bill of lading, the shipper, or agent of the owner of the property carried, expressly accepts and agrees to all its stipulations and conditions."

Demurrer to answer.

This is a suit brought by John Milne against John M. Douglass, receiver of the Ohio & Mississippi Railway Company, and the New York, Pennsylvania & Ohio Railroad Company, the New York, Lake Erie & Western Railroad Company, and the Red Cross Line of steam-ships. The petition states that plaintiff is a commission merchant, doing business at Dundee, Scotland; that said steam-ship line and railroad companies are corporations; that said Douglass is receiver of the company first aforesaid; that defendants had received certain shipments of flour in the city of St. Louis for and on account of plaintiff, to be transported by them to Dundee, Scotland; that defendants failed to transport said flour within a reasonable time to its said destination; and that plaintiff was thereby damaged in a sum stated. Defend-

ant Douglass filed a separate answer stating that said flour had been shipped under bills of lading attached to the answer; that it had been transported by the Ohio & Mississippi Railway Company to the end of its line without delay, and then delivered in safety to the New York, Pennsylvania & Ohio Railroad Company, and that its liability under said bills of lading thereupon ceased. The New York, Pennsylvania & Ohio Railroad Company and the New York, Lake Erie & Western Railroad Company filed similar answers, each alleging that the flour had been transported over its road without delay, and turned over to the connecting line in safety. The bills of lading referred to by defendants' answers were each, so far as they need be here set out, as follows:

"Through bill of lading, No. —, of the Ohio & Mississippi Railway, New York, Pennsylvania & Ohio Railroad, and New York, Lake Erie & Western Railroad, and the Red Cross Steam-ship Line, from St. Louis to Dundee. Shipped . . . per Ohio & Mississippi Railway, New York, Pennsylvania & Ohio Railroad, and New York, Lake Erie & Western Railroad, to New York, to be there delivered to the steam-ship pier for transportation by the Red Cross Line of steam-ships, or other steamers, from New York to Dundee, Scotland, the following property: . . . To be delivered in like good order and condition at Dundee unto order, . . . under the following terms and conditions, viz.:

. . . . . .

"It is further stipulated and agreed that in case any loss, detriment or damage is done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage.

. . . . . .

"It is further agreed that the said Ohio & Mississippi

Railway, New York, Pennsylvania & Ohio Railroad, and New York, Lake Erie & Western Railroad have the liberty to forward the goods or property to port of destination by any other steam-ship company than that named herein, and this contract is executed and accomplished, and the liability of the Ohio & Mississippi Railway, New York, Pennsylvania & Ohio Railroad, and New York, Lake Erie & Western Railroad, as common carriers thereunder, terminates on the delivery of the goods or property to the steamer or steam-ship company's pier at the port of New York, when the responsibility of the steam-ship company commences, and not before.

. . . . . .

"NOTICE. In accepting this bill of lading, the shipper, or agent of the owner of the property carried, expressly accepts and agrees to all its stipulations, exceptions and conditions.

"In witness whereof, the agent, signing for the said railway lines and steam-ship company, hath affirmed three bills of lading. . . .

"C. L. DEAN,
"Agent severally, but not jointly."

No answer was filed by the Red Cross Line of steam-ships.

Plaintiff demurred to all three answers on the ground that the matter and things therein contained constitute no defense to the plaintiff's action, or show any relief from the liability incurred when the bills of lading referred to therein were signed and the flour received for shipment.

G. M. Stewart and *Paul Bakewell*, for plaintiff.
Garland & Pollard, for defendants.

TREAT, *District Judge.*— The purpose of these demurrers is to call for an interpretation of the bills of lading, and the liabilities of the respective parties thereunder. Possibly the question presented may not, for technical reasons, fully arise on the demurrers, yet as the defendants stand on the con-

tracts exhibited and count thereon, the court states that the contract as executed, despite some inconsistent terms therein printed, and despite the designation by the agent that he signed the same, "agent severally, but not jointly," bind each and all of the parties for the safe delivery at the place of destination of the property shipped. Such it is held is the true construction, in the light of the better authorities, now put on contracts like these here presented. See *Railroad Co.* v. *Mills*, 22 Wall. 594; Hutch. Carr. §§ 146, 152; *Bank, etc.* v. *Adams Ex. Co.* 93 U. S. 174; *Myrick* v. *Michigan Cent. R. Co.* 7 Rep. 229; *R'y Co.* v. *Pratt*, 22 Wall. 123, 130; Lawson, Cont. Carr. 343. See, also, note to *Snider* v. *Express Co.* 4 Cent. Law J. 179, 180, 181; *Hooper* v. *Wells*, 5 Am. Law Reg. (N. S.) 16, with notes by Judge Redfield; 2 Am. Law Rev. 426.

Reference is made by defendants to *Citizens' Ins. Co.* v. *Kountz*, 10 Fed. Rep. 768, which it is supposed presents a different view. So far as the statute of Missouri (R. S. 1879, p. 95) may or may not affect the rights of parties under circumstances like these here presented, it must suffice to state that it is in accord with the general doctrine here announced.

The demurrers are sustained.

Gallena *v.* Hot Springs Railroad.

(Eastern District of Arkansas. April, 1882.)

1. Railroads — Ejecting Passenger from Train. — Where the legal right of a conductor of a railroad train to eject or remove a passenger from the cars exists, he must effect the removal at a proper place and in a proper manner, and with no more confusion, force or violence than is reasonably necessary for the purpose.
2. Same — Duty of Conductor in Ejecting Passenger. — Before a conductor can require a passenger to get off the cars he should stop the train at a station or depot, or where he could be put off without

this ticket, to which the plaintiff subscribed, the fifth of which reads as follows:

"It is not good for return passage unless the holder identifies himself or herself as the original purchaser to the satisfaction of an authorized agent of the Hot Springs Railroad; and when officially signed and dated in ink, and duly witnessed and stamped by said agent, this ticket shall then be good only one day after such date, and in no case after the thirty-first day of August following date of sale."

And these further stipulations comprise a part of the contract signed by the plaintiff:

"Unless all the conditions on this ticket are fully complied with, it shall be void."

"In consideration of the reduced rate at which this ticket was sold, I agree to the above contract."

The contract is signed by the plaintiff and the agent of the railroad company, and immediately below the first coupon on the return part of the ticket is this notification:

"To PURCHASERS.— Read the contract and take notice that the return part of this ticket must be stamped and your signature witnessed by a ticket agent of the Hot Springs Railroad before it will be honored for passage."

The following is the sixth clause of the contract subscribed by the plaintiff:

"I, the original purchaser, hereby agree to sign my name, and otherwise identify myself as such, whenever called upon to do so by *any* conductor or agent of the *line or lines* over which this ticket reads."

Confessedly this sixth clause, taken by itself, would imply that all the holder had to do was to sign his name and identify himself as the original purchaser when *called upon to do so by any conductor or agent* of the railroad company, and that until such demand was made upon him he had nothing to do. But in the opinion of the court this sixth clause does not annul or supersede the requirements of the fifth clause.

but they both stand and are effectual for the purpose for which they were severally intended. If the usual full-fare tickets issued to passengers contained like conditions with those on this ticket, the purchaser whose attention was not expressly called to them before he took passage, and who did not assent to them, would probably not be bound thereby. But where one without being induced thereto by fraud signs a contract for a special-rate ticket, the law conclusively presumes he knows the contents of such contract, and he is bound thereby.

It follows, therefore, that the plaintiff should have identified himself to an agent of the defendant company, and otherwise complied with the requirements of the fifth clause of the contract, before taking passage on the train at Hot Springs, and that not having done so he had not, under the terms of the contract between himself and the company, the right to return on that ticket. It matters not that the plaintiff was in fact the original purchaser of the ticket, and that he was ready and offered to sign the ticket, and identify himself as such to the conductor on the train, or to the agent at Malvern, upon the arrival of the train at that place. This is a technical and strict legal construction of the contract, but it is one the railroad company had a right to insist on; and standing on its strict legal rights under the contract between itself and the plaintiff, the conductor had a right to refuse to honor the plaintiff's ticket, and require him to leave the cars; and if the plaintiff declined to do so, the conductor had a strict legal right to remove him therefrom *at a proper place and in a proper manner.* "The law allows it, and the court awards it."

2. But where the law gives the conductor this right, it at the *same time regulates the mode of its exercise.* Where the legal right to eject or remove a passenger from the cars exists, the law does not invest the conductor with the power to effect the removal at such place and in such mode and manner as his whim, caprice or malice may dictate or sug-

gest. But the removal must be effected at a proper place, and with no more confusion, force or violence than is reasonably necessary for the purpose. This is due to the other passengers on the train, no less than the passenger ejected. Especially is this rule applicable to a case where the passenger is on the train in good faith, holding a ticket for which he has paid the required price, but which he cannot legally require the conductor to honor, on account of a mere oversight to comply with some of its numerous conditions, or an honest misinterpretation of them on his part, or more likely from an utter ignorance of their existence. A passenger on a train under such circumstances is not to be regarded or treated as though he were a felon or an outlaw.

Applying these general principles of law to the case at bar, I instruct you that before the conductor required the plaintiff to get off the train he should have stopped at a station or depot where the plaintiff, if he had chosen so to do, could have got off without danger, or where, if he declined voluntarily to get off, he could have been put off without injury or danger of injury of any kind except such as he might necessarily and justly bring upon himself by forcible resistance to the lawful authority of the conductor. Where the right to put a peaceable passenger off the train exists, it must be exercised at a station or depot. The humanity and justice of the law will not permit a conductor to put such a passenger off the train at any place his caprice may suggest. If the law were otherwise, it would be in the power of a conductor to inflict great oppression on a passenger whom he had the right to remove from his train. A passenger put off between stations on roads running through swamps or other unsettled districts might suffer great hardships, and even perish, before he could reach shelter or food.

The conductor himself testifies that the plaintiff not only made no forcible resistance to his authority, but that he never threatened nor intimated that it was his purpose to do so at any time. He told the conductor that while he would offer

no resistance to being put off, he would not voluntarily get off, because he believed his ticket was good, and he wanted to test his right to ride on it. The conductor further testifies that before making any effort to induce plaintiff to get off the car the second time, he went to the baggage car and procured a loaded revolver, of the army size, with which he returned to the car in which the plaintiff and other passengers were riding, and that holding the revolver in his right hand he laid his left hand on the plaintiff and conducted him to the platform of the car, and there required the plaintiff to jump off, which he did while the train was running at a low rate of speed, and at a place where there was a ditch four or five feet deep, into which the plaintiff was precipitated. The place where this occurred was some two miles or more from any station or depot. The conductor says he was not angry or violent in his deportment to the plaintiff at this time, and that he did not forcibly fling him off the platform into the ditch.

The plaintiff and many other witnesses who were in the car as passengers testify that the conductor was angry and insulting and threatening in his manner and language in a high degree, and that he hurled the plaintiff from the platform into a ditch six or eight feet deep with great force and violence, when the speed of the train was from eight to twelve miles an hour, to the imminent peril of his life and limb. And the passengers testify that immediately after throwing the plaintiff from the train, the conductor placed himself in the door of the passenger car, and flourishing his six-shooter in the face of his passengers, cried out: "Is there anybody else in here wants any of this?"

It is your province to reconcile all differences in the testimony of the witnesses if you can do so, but if the difference is irreconcilable, then you will give the credit to those whom you believe speak the truth; and in determining whom you will believe, you will take into consideration the relation they sustain to the case, the probable motives, if any, that

influence them in giving their testimony, their demeanor on the stand, their opportunities to know and see the facts about which they testify, and the reasonableness or unreasonableness of their testimony, in view of your knowledge of human nature, and the established and undoubted facts in the case.

The following is an extract from the testimony of the conductor:

By the Court: *Question.* Had the plaintiff himself exhibited any weapon? *Answer.* No, sir. *Q.* Had he made any forcible resistance? *A.* No, sir.

By Mr. Moore: *Q.* Do I understand you to state that it was your object in getting that pistol to prevent these passengers from assisting Gallena on the train; that you thought from their statements they were going to interfere? *A.* Yes, sir; that is my simple reason.

By Col. Young: *Q.* That you got that pistol for the purpose of using it on Gallena or some one else? *A.* No, sir.

By the Court: *Q.* You say that plaintiff had not made any forcible resistance, or offered any? *A.* No, sir. *Q.* Had he intimated any? *A.* Not that I heard. *Q.* Had any person made any exhibition of violence towards you? *A.* No, sir; except by language. *Q.* When you found that he was on the train, what effort did you make to put him off, or induce him to get off, before you got the pistol? *A.* None whatever. *Q.* What kind of a pistol was it? *A.* It was a revolver, army size; six-shooter.

In approaching the plaintiff in a menacing manner with a loaded army revolver in his hand, before making any effort to induce him to get off, or to put him off, and when the defendant had not made, or threatened that he would make, any forcible resistance to his authority, the conductor was guilty of a gross outrage, not only on the plaintiff, but as well upon all other passengers whose lives would be put in peril by the use of such a deadly weapon in the car, and who

could not fail to be justly alarmed and disturbed by its exhibition under the circumstances. Conductors have no right to draw a deadly weapon on a passenger who is quiet and peaceable, and who has not offered, and is not threatening, any violence to the conductor or other passengers. Deadly weapons of such character are never to be brought into requisition by a conductor of a passenger train except to protect himself, or the passengers under his charge, from deadly or unlawful assaults. He cannot collect fares, or compel passengers traveling without tickets to jump from a moving train, by the use or exhibition of such a weapon. And with or without the use of a deadly weapon he has no right to hurl a passenger from a moving train into a ditch. And to compel the passenger, by commands or threats, to jump from a moving train into a ditch, is as much a violation of the law and the rights of the passengers as if the conductor had hurled him from the car by actual physical force. The office of conductor of a passenger train is an exceedingly important and responsible one. There are few positions which demand of their incumbents more good judgment and self-possession. Not only the peace and comfort, but the lives as well, of passengers are in their keeping. They must not, by any act of their own, disturb the one or endanger the other. They have to deal with all classes of people. They daily come in contact with the unscrupulous and dishonest, who are seeking to defraud the railroad company of what is justly its due, and are often grossly insulted by the ignorant and vulgar for a lawful and proper discharge of their duties. It is obvious that if a conductor was to attempt to redress every personal insult, or enter a boisterous quarrel with every vulgar and rude person who might invite it, there would be no peace or safety for his passengers. He must decline all such contests. He can take action only in those cases where the rights of the railroad company, or the peace or safety of the passengers under his charge, or his own safety, demand it. And then he can only act in the mode

and manner heretofore indicated, accomplishing what he has a right to do in the given case with as little force, violence and confusion as is practicable and reasonable under the circumstances.

The remarks of one or more of the passengers to the plaintiff when put off the train the first time, to the effect that his ticket was good, and to get back on the train; that if he paid his fare the conductor would probably appropriate it to his own use,— were uttered, the conductor himself testifies, without any exhibition or threat of violence, and, however irritating to the conductor, constituted no justification or excuse for his subsequent treatment of the plaintiff, nor for his menacing with a six-shooter a car full of peaceable passengers. Words, however irritating or opprobrious, will not justify an assault by one under no special obligation to keep the peace; much less will they justify an assault by a conductor, who is, by virtue of his position, not only bound to keep the peace himself, but whose duty it is to maintain peace and order in the cars, and protect the passengers in his charge from assaults and violence.

The law requires railroad companies to carry their passengers safely and treat them respectfully. They are under obligations to use proper precautions and exertions to protect passengers while in the cars from the violence and insults of strangers and co-passengers, and they are bound, of course, to protect them from the assaults, insults and violence of their own conductors and servants. They select and appoint their own conductors without consulting their passengers, and it is but reasonable that they should be held responsible for any act of violence to the passengers of which the conductors may be guilty. The moment the passenger enters the car he is more or less under the control of the conductor, and subject to his orders. Fit or unfit, humane or brutal, good-tempered or morose, the passenger is comparatively helpless, and may be obliged to submit for the time without any means of redress. *Pendleton* v. *Kinsley*, 3 Cliff. 416. The

law, therefore, makes it the duty of railroad companies to employ competent, sober and civil men to discharge the responsible duties devolving on a conductor; and for the assaults, injuries and wrongs inflicted on a passenger by a conductor, in the course of his employment as such, the railroad company is responsible.

If, applying the rules of law I have laid down to the testimony in this case, you find that the plaintiff was expelled from the car in an improper manner and at an improper place, the plaintiff is entitled to a verdict at your hands, and the only remaining question is as to the amount of damages you will award him.

3. This makes it necessary for the court to instruct you with reference to the rules adopted by the law to guide and govern you in measuring and ascertaining such damages.

Damages are of two kinds: (1) Actual or compensatory damages; (2) exemplary or vindictive damages, or, as it is sometimes called, "smart money." The plaintiff claims to recover both.

If you find the plaintiff was put off the train in an improper manner and at an improper place, then he is entitled to recover a fair and reasonable compensation for the bodily injuries sustained, and the mental suffering and anguish resulting from the assault, indignity and insult inflicted upon him in the presence of his wife and child and the other passengers on the train. The plaintiff is not required to prove by witnesses what would under the circumstances be a just and fair compensation for the mental and bodily suffering inflicted upon him.

"The law leaves the amount to your sound judgments, reasonably, fairly and dispassionately exercised. This it does from necessity. If one man owes another so many dollars, or has taken from him so much property, there is something to measure (as the law expresses it) the amount of the damages or the recovery. But in an action of this kind the law is unable to furnish you with any definite rule to measure

the damages. It confides it to the sound, temperate, deliberate and reasonable exercise of your functions as jurymen."

The circumstances which will authorize the infliction by the jury of exemplary damages or smart money is thus stated by the supreme court of the United States:

"Where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the compensation for actual damages something further by way of punishment or example, which has sometimes been called smart money. This has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." *Day* v. *Woodworth*, 13 How. 371; *Milwaukee R. Co.* v. *Arms*, 91 U. S. 489.

You will inquire and decide whether, considering all the circumstances in evidence in this case, it comes within this rule, and is one in which, in addition to compensating the plaintiff for his actual damages, the defendant should also be punished in damages for example's sake.

If you decide to go beyond the limits of compensation to the plaintiff and enter into the field of exemplary damages, then it is your duty to put yourselves in the situation of the parties as near as may be; to look at all the circumstances under which the conductor acted—at those which are claimed to aggravate and at those which are claimed to mitigate the acts complained of; and in this connection you may consider the character and disposition of the conductor as disclosed by the evidence; whether other passengers holding tickets similar to that of plaintiff's were permitted by the conductor to ride to Malvern and there identify themselves and have their tickets stamped, and whether the railroad company, with a full knowledge of all the facts, approved the action of the conductor and retained him in its service. While, in the language of the supreme court, "it is left to the discretion of the jury" to determine the amount of exemplary damages they will award in cases where they find

the injury has been wanton and malicious, or gross and outrageous, yet this is not a discretion to be wildly, wantonly or recklessly exercised, but it is a discretion to be guided and controlled by the deliberate and impartial exercise of common sense and sound judgment.

And, if you find this is a case calling for the imposition of exemplary damages, you should not, in an effort to punish the defendant for the malicious, gross or excessive action of its conductor, yourselves commit an excess by awarding to the plaintiff an extravagant or unreasonable amount.

You are the sole judges of the facts in the case, the credibility of the witnesses, and the weight to be given to their testimony.

The jury returned a verdict for the plaintiff for $4,900.

The defendant filed a motion for a new trial upon the ground the damages were excessive. This motion, before argument upon it, was withdrawn, the plaintiff agreeing to receive $4,000 in satisfaction of his judgment, in consideration of the speedy payment of that sum, and the withdrawal of the motion.

Casey Young and *G. W. Gordon*, for plaintiff.

John M. Moore, for defendant.

The Mill Boy.

(Eastern District of Arkansas. July, 1882.)

1. Shipping — Carrier by Water — Rivers of the Southwest. — The rules regulating the liability of a carrier of goods by water to landings where there are wharves and warehouses, and where the consignee resides or may be found, are not applicable to neighborhood or way landings on the river banks of the southwest, where there is no wharf and no warehouse, and where the consignee does not reside, and is not to be found.
2. Same — Usage and Custom. — The usage and custom has been uniform that when a boat puts goods off at such landing in good order

and condition, and the person living at or near the landing is notified of the fact, and requested to look after them and notify the consignees, the liability of the boat is at an end, and, being reasonable, contracts of affreightment will be presumed to have been made with reference to such usage and custom.

3. SAME — DUTY AND OBLIGATIONS OF CONSIGNEES — LOCAL USAGE AND CUSTOM.— Where the consignees had notice in fact of the precise character of the landing, and ordered a mill consigned to such landing, and lived at a distance from it, with no direct or speedy means of communication between the landing and themselves, it was their duty to have been in attendance to receive the mill, or to have had an agent at or near the landing for that purpose, if they did not desire to be bound by delivery in accordance with the usage and custom of the landing.

CALDWELL, *District Judge.* — On the eighth of September, 1881, the libelants directed their correspondents at Little Rock to ship to them by boat, "to Cates' landing, on the Arkansas river," a Bradford pulley grist-mill, consisting of thirty-inch stones, stand, and hopper. On the twenty-seventh of September the mill was shipped on the defendant boat, consigned as directed. There is no wharf or warehouse at Cates' landing, and no means of storing or protecting goods put out there. In low water, boats cannot reach the high banks in consequence of a prominent sand bar, extending from the main land far out into the river channel, and at such time it is conceded the "landing" is on this sand bar, which is so broad that teams have to be employed to convey goods to the main land. But this carriage of goods over the bar is always done by the consignee and never by the boat. The boat put the mill off in good order and condition, and at the place all goods for that landing are discharged and received by the consignee, when the river is at the stage it then was. The libelants resided some twenty miles from the landing, and there was no means of direct or speedy communication between the landing and the place where they reside. They owned a steam saw-mill, situated about two miles from the landing, where the mill in question was designed for use, and it was shipped by boat to this landing on account of its

proximity to the place where it was to be run. One Lyon was at libelants' saw-mill running and managing the same, and was commonly reputed to be the agent of the libelants in matters pertaining to such mill, though one of the libelants testifies that he was not their agent for any purpose. The officers of the boat, in conformity to usage, notified a citizen who resided on the bank of the river at the landing that the mill had been put off, and requested him to notify libelants, or their agent, of the fact; and the freight bill was left with him, as was usual with all boats leaving goods at that landing. He notified Lyon, who said he would come for the mill as soon as he could get a team to haul it, and he made unsuccessful efforts to get a team for that purpose. He also sent word to libelants the first opportunity he had of doing so, which was four or five days after the mill was landed. Lyon failed to come and get the mill, and the day after libelants were personally notified of its arrival, and before they had had time to make the necessary arrangements to remove it, a sudden rise in the river carried the mill off and it was lost. The mill remained a week where the boat left it before the rise came which washed it away. On this state of facts is the boat liable for the loss of the mill?

The general rule is that the carrier by water may deliver goods on the wharf, but to constitute a valid delivery there, the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods, or put them under proper care and custody.

The learned proctor for the libelants insists that this general rule governs this case, and that, though the mill was deposited at the proper landing, the boat was not discharged from liability because the libelants were not notified.

I am inclined to think the testimony supports the conclusion that Lyon was the agent of the libelants to receive notice that the mill was deposited at the landing; and notice having been given to him in apt time, the boat was dis-

charged from liability under the rule contended for. But if I am mistaken in supposing Lyon was libelants' agent, the same result is reached on other grounds. The rules regulating the liability of a carrier of goods by water to landings where there are wharfs and warehouses, and where the consignee resides or may be found, are not applicable to a case like this.

The question in this case is, when is the carrier discharged from liability, when the contract is to carry to a neighborhood or way landing where there is no wharf and no warehouse, and where the consignee does not reside and is not to be found?

Such landings are not uncommon on the rivers of the southwest. They are established, or rather named, by the settlers living in the vicinity for their own convenience, and to avoid the labor, expense and delay of traveling to some established wharf or landing where the usual facilities for storing goods may be found. It is a well-known fact that on the Arkansas and other rivers in the southwest the distance between towns or established ports where there are warehouses, or wharf-boats, is often very great. The necessities and convenience of the settlers imperatively require that their goods should be delivered on the bank of the river, as near their plantations and homes as practicable, regardless of wharfs or warehouses. The practical sense and generous spirit of good neighborship which characterized these settlers very soon devised means for accomplishing the desired ends. It was perceived at once that the rules governing the rights and duties of carriers by water, where the contract is to carry to some established port having a wharf or warehouse, and where the consignee resided or might be found, or where he could be speedily notified by telegraph or otherwise, could have no application to these country or way landings. It was seen that a boat could not be required to lay at each one of these landings until the consignees appeared to receive their goods, or until notice of their arrival could be sent to them. To

impose such an obligation on a boat would protract her voyage unreasonably and indefinitely; and no boat would receive goods consigned to a way landing, if such an obligation had to be incurred. Accordingly, some spot deemed most favorable for a boat landing would be fixed upon by the settlers and given a name. Some settler living at or near the landing, for the accommodation of his neighbors, would take it upon himself to notify them, by some of those casual methods usual among people in the country, when goods were put off at the landing for them, and would assume such care and oversight over the goods in the meantime as good neighborship and the necessities of the case seemed to require. And the usage and custom has been uniform that, when the boat put goods off at such a landing in good order and condition, and the person living at or near the landing was notified of the fact and requested to look after them, and notify the consignee, the liability of the boat was at an end. This usage and custom is strikingly analogous to the rule governing the liability of carriers where goods are consigned to ports having the usual storage facilities.

In *Fisk* v. *Newton*, 1 Denio, 45, the court says:

"Where goods are safely conveyed to the place of destination, and the consignee is dead, absent, or refuses to receive, or is not known, and cannot, after due efforts are made, be found, the carrier may discharge himself from further responsibility by placing the goods in store with some responsible third person in that business at the place of delivery, for and on account of the owner. When so delivered the storehouse keeper becomes the bailee and agent of the owner in respect to such goods."

And the person in whose charge, in a very general sense, the goods may be said to be left at these landings, and who is expected to notify the consignee, is, as between the carrier and consignee, to be regarded as the bailee or agent of the latter, and not of the former, although no such relation may exist in fact between him and the consignee, or certainly

none other than that of a bailee without reward. The usage and custom relating to the delivery of goods at these landings is shown to have prevailed, and to have been generally known and uniformly acted upon ever since boats have navigated the Arkansas river, now more than half a century. It is a reasonable usage, and contracts of affreightment will be presumed to have been made with reference to it. Persons consigning goods to such landings must, therefore, be held to know their character, and the usage and custom relating to the delivery of freight thereat.

The libelants had notice in fact of the precise character of Cates' landing; and having ordered the mill consigned to this landing, and living at a distance from it, with no direct or speedy means of communication between the landing and themselves, it was their duty to have been in attendance to receive the mill, or to have had an agent at or near the landing for that purpose, if they did not desire to be bound by the delivery in accordance with the usage and custom of the landing. The boat earned her freight. The libel will be dismissed, and a decree entered against the libelants in favor of the owner and claimants of the boat for the freight and all costs.

M. W. Benjamin, for libelants.

G. B. Dennison, for claimant.

BARTLETT and others *v.* SMITH.

(District of Minnesota. July, 1882.)

1. SALE AND DELIVERY — TIME CONTRACTS. — The purchase or sale of wheat to be delivered at a future time is a fair contract if the intention of the contracting parties is to deliver the wheat, although it is not in their possession at the time of the contract of sale; but if the intention is not to deliver, but to settle differences between the contract price and the then market price, the transaction is illegal and void.

2. SAME — RIGHT TO RECOVER ADVANCES. — Where parties knowingly furnish means for an illegal transaction, and make advances in the settlement of losses under illegal contracts, the court will not aid them to recover moneys thus paid out; but if parties acting as brokers in the sale and purchase of wheat, without disclosing the name of their principal, enter into *bona fide* contracts for the actual sale and delivery of wheat with third parties for defendant's account, and at his request settled the losses and paid the amount due under the contracts, they are entitled to recover the moneys thus paid out.
3. SAME — SALE OF PROPERTY NOT ON HAND. — It is not necessary, in case of a sale or purchase of property for future delivery, that the property shall actually be on hand at the time.
4. CONTRACT — MUTUALITY OF INTENT. — A contract which is valid in law cannot be rendered illegal by the mere intention of one of the parties to the contract to do something which, if mutually intended, would render it invalid.
5. PRINCIPAL AND AGENT — ADVANCES BY AGENT — RECOVERY OF. — If a principal employs an agent to transact a legitimate business for him, and in conducting such business the agent is authorized to advance money on his principal's account, the law protects the agent, and he may recover the money so advanced if the transactions are legitimate.

When the plaintiffs' testimony was closed the defendant moved the court to instruct the jury to find a verdict for the defendant. After the argument and submission of this motion, the court, — his honor, Judge NELSON, presiding, — in deciding the same, said:

NELSON, *District Judge.* — I decline to take this case from the jury. I think there is an underlying question of fact here which they must determine, and that is, were the contracts legitimately entered into? were they contracts for the actual delivery of wheat? or were they mere subterfuges, and entered into on the part of the plaintiffs and third parties for the purpose of promoting gambling transactions? That is an underlying question of fact which it seems to me the jury must determine, and I cannot say, in examining this rule, that although these contracts were made subject to this rule 9 — and, perhaps, rule 10 — of the chamber of com-

merce, they upon their face are gambling contracts. It is not an unusual thing, where parties enter into contracts for the delivery of personal property at a future time, to put up earnest money for the fulfilment and performance of those contracts. Under these rules, what is called a "margin" is required for the faithful performance of the contract that is entered into. It may be that parties under these rules — members of that chamber of commerce — may engage in illegitimate trade, but I cannot, from reading the rules, construe them (taking them together) to intend that all contracts which are entered into by the members of that chamber are gambling transactions.

Now, the proviso to section 5, which was read by the counsel here, is one under which gambling contracts might be entered into, but it does not necessarily follow that when a contract like this in evidence is entered into by a member of that chamber, although providing that it is subject to the rules and regulations of the chamber of commerce, there shall be no actual delivery of wheat.

If it was the intention of the parties to the contract that there should be a delivery of wheat, although subject to the rules and regulations of the chamber of commerce, it is not an illegal contract.

It is a fair question for the jury to say, and it is for them to determine, in the light of all the evidence here as to the usages of the members of that chamber of commerce, as to the facts and the circumstances attending these transactions and the conduct of the parties, whether they were actual contracts for the delivery of wheat, or whether they were mere subterfuges entered into to enable the parties to engage in speculation in margins.

In that view, I propose to leave (under proper instructions) the whole question for them to determine, whether there was a fair contract for the delivery of actual wheat, or whether it was a speculation on margins. Now, the first part of this section 5 of rule 9 provides that "any party who shall

contract to buy or sell property, and who shall fail to respond within the next one and one-half banking hours, after having been called on for security [margins, in case the property rises or falls], as hereinbefore provided, shall be judged to have defaulted on his contract; and in case of such default, the party who has called for such security shall have the right to buy or sell (as the case may be) the property named in said contract, in the quantity and for the time of delivery specified in said contract, and all differences between the contract price and the price at which the property may have been sold or bought (as the case may be), in consequence of such default, shall constitute the rule and measure of damages against the party in default; provided, that in case the party calling for security shall elect not to buy or sell the property, as hereinbefore provided, he may have the right, by giving notice to the delinquent (as provided in section 6 of this rule), to consider the contract then terminated at the market price of the property named for the delivery specified in the contract. And the party so terminating the contract may forthwith proceed against the party so defaulting for the collection or enforcing payment of all damages sustained by reason of such default; and the rule and measure of such damages shall be the difference between the contract price and the market price (at the time of giving such notice) of the property named for the delivery specified in the contract."

These contracts are entered into for the purchase or sale of a certain amount of wheat, at seller's option for future delivery.

Now, suppose A. has sold B. five thousand bushels of wheat to be delivered in August, seller's option, at one dollar; the wheat falls off five cents, and B. calls for further security (under these rules and regulations), which is not put up by A. Now, under this rule, A. having failed to put up this further security, has defaulted. Now, then, B. can go into the market and buy five thousand bushels of wheat at the market price (that is, it must be an actual purchase), and in

case he brings suit against A., what is the measure of damages? It would be the difference between the price which he paid when he went into the market and the contract price. That is the legal rule of damages.

Where the earnest money is put up in that way, and the parties agree that in case of a rise or fall in the market they may call for further security, and, if that security has not been put up, the party may go into the market and buy five thousand bushels of wheat (in this instance, say), he can recover the difference between the contract price and the price that he paid in the market for the wheat. It may be this is all sham. It may be these parties have entered into contracts of this character, and, instead of going into the market, have merely drawn up between third parties and themselves contracts which, upon their face, purport to be the purchase and sale of wheat, when it was never intended that there should be an actual delivery of wheat at all. If this is so, then it is a gambling transaction. The law never upholds gambling transactions in any instance, and particularly is a gambling transaction in wheat pernicious, and it cannot be sustained.

Parties who speculate in the breadstuffs of the country demoralize not only the trade but injure the producers themselves. When the case arises, and the party seeks to enforce a gambling transaction, the court will say: "We will not aid you to enforce it." If there be any loss in the transaction, the party who loses cannot recover.

I shall leave it to the jury, gentlemen, to determine whether there has been, in the first instance, any actual sale and delivery of wheat. The other instructions they will receive as I come to deliver my charge.

After all of the testimony was in, and argument by counsel —

NELSON, *District Judge (charging jury).*—You have listened to very elaborate arguments of the facts by counsel. If I can give you the law of the case so you will understand

it, I think you will have little difficulty in coming to a conclusion.

The plaintiffs bring this suit against the defendant to recover for services and alleged advances made on the defendant's account in the sale and purchase of wheat for future delivery during the years of 1879, 1880 and 1881.

The plaintiffs are commission merchants and brokers. They are citizens of the state of Wisconsin, and reside in the city of Milwaukee, and the defendant is a citizen of the state of Minnesota. The amount claimed is about $13,000. The defendant is a wheat dealer, miller and warehouseman, and during these years authorized the plaintiffs, by letters and telegrams, nearly every day, for the greater part of the time he operated, to sell and purchase wheat on his account and for his benefit. Under these contracts, whether a purchase or sale of wheat, the wheat was to be delivered in Milwaukee, and in most instances the defendant was a seller. The plaintiffs were members of the chamber of commerce in the city of Milwaukee (a corporation created by the laws of Wisconsin), and, when orders were received by these plaintiffs from the defendant, they made contracts with the members of the chamber, and in all contracts stipulated that they were subject to the rules and regulations of the chamber of commerce. The plaintiffs conducted the business in their own name, and upon the face of the contracts the name of their principal is not disclosed.

The purchase or sale of wheat to be delivered at a future time is a fair contract, if the intention of the contracting parties is to deliver the wheat, although it is not in their possession at the time of the contract of sale. But if the contract does not contemplate the delivery of wheat, but the settlement of differences between the contract price and the then market price, the transaction is illegal and void, being contrary to public policy, and demoralizing to legitimate trade and commerce. The chief controversy in this case is about the character of the transactions between the parties.

The defenses urged upon the part of the defendant to defeat a recovery may be reduced to two: *First*, that the contracts entered into by the plaintiffs as agents for the defendant were wagers, contrary to public policy and void. *Second*, that the plaintiffs furnished the defendant money for the express purpose of enabling him to engage in an illegitimate enterprise, and therefore cannot recover for any advances made for such purpose. This is the theory of the case on the part of the defendant, and evidence has been introduced tending to support it.

The theory of the plaintiffs is, and evidence has been introduced tending to sustain it, that they were employed as brokers or commission merchants to purchase or to sell wheat for future delivery, and that in all of the contracts entered into by them with third parties they conducted the business in their own name, but for defendant's benefit and on his account, and in every instance an actual delivery of wheat was intended by them and the other parties to the contract, and that subsequently they were instructed to close up and settle up these contracts by the defendant, and in doing so, at his request, advances were made and their money paid out for his benefit, and to recover this sum suit is brought, and they are entitled to recover.

These are the issues between the parties which you are to decide. If you believe from the evidence that no wheat was to be delivered, and that the contracts for the sale and purchase of wheat were merely colorable, and were made and executed as a cover for speculations in margins, and in case the price of wheat rose or fell in the market, differences merely were to be paid, then the contracts are in their nature and character wagers, and illegal. Neither an offer or an ability to perform is required of either party in order to entitle the party claiming a breach of contract to the differences. If the plaintiffs, in your opinion, are shown by the evidence to have been employed by the defendant to make contracts of this character with third parties, and have conducted the business in their own name and for defendant's

benefit, and supplied the defendant with funds for the express purpose of enabling the defendant to engage in these transactions, and have paid out and advanced money in the settlement of losses arising under such contracts, they cannot maintain this suit to recover the money so expended. In that case they knowingly furnish the means for an illegal transaction, and made advances in the settlement of losses under illegal contracts, and the court will not aid them to recover moneys thus paid out.

On the other hand, if you believe the evidence shows that the plaintiffs, acting as the defendant's brokers in the sale and purchase of wheat, without disclosing the name of their principal, entered into *bona fide* contracts for the actual sale and delivery of wheat with third parties for defendant's account, and at his request subsequently settled the losses and paid the amount due under the contracts, they are entitled to recover from the defendant the moneys thus paid out at his request. The form, however, of these contracts (which on their face specify wheat to be delivered) is not conclusive of their character. You must look into the transactions themselves, and determine from the testimony and the facts and the circumstances attending the making of the contracts, and the conduct of the parties with reference to them, whether the contracts are illegal and void within the rule laid down, or whether they are *bona fide;* and in determining this question you may take into consideration the fact that these contracts are subject to the rules and regulations of the chamber of commerce in the city of Milwaukee, and that under those rules it is possible for persons on that board to speculate in margins under the forms of contracts like those in evidence; and you may also look at the usages of this trade and business in order to determine the intention of the parties thereto.

If, on full consideration, you should determine the arrangement or understanding between the parties to the contract was a gaming transaction, as defined, and the money was

advanced by plaintiffs to enable the defendant to engage in such illegal transactions, and that the plaintiffs and defendant had in view mere wagering contracts upon the price of wheat, and the advances which the plaintiffs made were paid out in contracts, which, between the plaintiffs and the parties with whom they dealt, were bets upon the market price of wheat, no delivery having been made or contemplated, then the plaintiffs cannot recover, and your verdict will be for the defendant.

If, on the other hand, you believe from the evidence the transactions were *bona fide* on the part of the plaintiffs; that they were employed by the defendant to buy and sell wheat for actual delivery, and bought and sold for actual delivery in their own name, but for defendant's benefit; that losses occurred in such transactions, and that plaintiffs advanced money to pay such losses,— the plaintiffs are entitled to recover.

You are to determine which theory is proved by the testimony. It is not the policy of the law to encourage or sanction wagering transactions (or any transactions) having an injurious and immoral tendency. But, on the other hand, if a principal employs an agent to transact a legitimate business for him, and in conducting such business the agent is authorized to advance money on his principal's account, in such case the law protects the agent, and he may recover the money so advanced, provided the transactions are legitimate.

Several special instructions have been requested on the part of the plaintiffs, as well as on the part of the defendant. I will read them with such modifications as I have made, giving some and rejecting others.

"The jury are instructed that it is not gambling for a party to enter into a fair and *bona fide* agreement to purchase or to sell property for future delivery. And the jury are further instructed that it is not necessary, in case of a sale or purchase of property for future delivery, that the party buying or selling should actually have the property in his possession

or under his control at the time of entering into the contract of sale or purchase.

"If the jury find from the evidence that the defendant requested the plaintiffs to purchase or to sell wheat for him for future delivery; and further find from the evidence that plaintiffs made such purchases, and in doing so entered into the contract read in evidence, and such contract intended the actual delivery of wheat, and subsequently were obliged to pay and did pay losses occasioned by the making of the said contracts; and further find from the evidence that at the time the said contracts of sale and purchase were made neither of the parties to the said contracts had either possession or control of wheat enough to fill the contracts,— that then and under such circumstances the contracts of purchase or sale are not wagering or gambling contracts, although the defendant, at the time he gave the order to buy or to sell, had no design, purpose or intention to either receive or deliver this wheat, but designed and intended merely to sell out before the time of delivery or receipt, and settle or adjust the losses on the mere differences in the market value of the wheat."

That is, in substance, that it is not necessary for parties to have the wheat on hand at the time, in order to enter into a contract for sale or purchase of wheat, to be delivered at a future time. That fact does not make it a gambling contract; neither does it make them gambling contracts if only one party intends to gamble by the transaction and does not intend to furnish or deliver the wheat which upon the contracts themselves purports to be delivered at a future time.

"If the jury find from the evidence that the plaintiffs are commission merchants in the city of Milwaukee and members of the chamber of commerce in that city, and that they, from time to time, and at various times in 1880 and 1881, received orders from the defendant to buy or sell wheat; and further find from the evidence that plaintiffs, acting in good faith and in the belief that defendant was

sending said orders in good faith, made actual purchases and sales for said defendant at his request, as ordered, and in such transactions laid out and expended money for defendant for the purpose of such actual delivery, then the plaintiffs are entitled to recover the amount thus paid, laid out and expended for this defendant.

"If the jury find from the evidence that the plaintiffs are commission merchants in the city of Milwaukee and members of the chamber of commerce in that city, and that they acted as the brokers of defendant and at defendant's request, and from time to time and at various times made in good faith the contracts read in evidence, on the order of defendant, and that said contracts intended the actual delivery of wheat therein mentioned, and in settlement of said contracts paid, laid out and expended money, for the money thus paid, laid out and expended for the defendant they can recover in this action.

"The contracts read in evidence are *prima facie* valid contracts in law, and such contracts cannot be rendered illegal by the mere intention of the defendant alone that he did not intend to deliver or receive the property."

That is, it takes two to make a contract. One party cannot defeat a contract and render it void in his own mind.

"To make said contract read in evidence void, as a wagering or gambling contract, each party to the contract must have designed and intended at the time the contract was entered into not to buy or receive the property, but to sell on the mere difference between the contract price and the market price.

"If the jury find from the evidence that the defendant intended to gamble in wheat, and at no time to deliver or receive the property or pay for it, and further find from the evidence that the plaintiffs were ignorant of such intention on the part of the defendant, and received the order of defendant to buy and to sell, and in good faith proceeded to buy and to sell on his orders, and in doing so incurred obli-

gations for said defendant, by the contract read, and said contracts intended the actual delivery of wheat in evidence, and that plaintiffs afterwards paid thereon money to settle or adjust the said contracts, then the plaintiffs are entitled to recover in this action for the money so paid."

I refuse to give No. 6.

I refuse to give No. 7.

"If the plaintiffs rendered to the defendant, from time to time, statements of purchases and sales made on his account, showing prices paid and received, and such purchases and sales were for the actual delivery of wheat [that is, you have heard the statements which were put in evidence, which were rendered; now, if you believe those statements represented purchases and sales for the actual delivery of wheat], and he retained them and did not within a reasonable time object to them, the law implies their correctness, and implies a contract by the defendant to pay the plaintiffs any balance that such statements show to be due to them.

"The burden of proof is on the defendant to show that these were gambling transactions. *Prima facie* they are valid, and if the defendant has failed to satisfy you by a fair preponderance of testimony that they were gambling contracts, the plaintiffs are entitled to recover."

There are several requests on the part of the defendant. I give three of them and refuse one:

"If the jury believe from the evidence that the transactions between the plaintiffs and defendant were transactions in which no actual sale and delivery of wheat was contemplated, but merely the payment of differences according to the rise and fall of the grain market, the contracts were gambling contracts, and void in law."

"If the jury find from the evidence that the plaintiffs in the transactions in controversy were brokers or factors of the defendant, and that in said transactions no actual sale and delivery of grain was contemplated, but merely the payment of differences according to the rise and fall of the grain mar-

ket, and that plaintiffs performed services for the defendant, and supplied him with funds, and made advances, for the express purpose of enabling defendant to engage in such transactions, and if they, as agents of the defendant, conducted such illegal ventures in their own name, they became *particeps criminis*, and the law will not aid them to recover moneys advanced for such purpose, or commissions earned in such transactions, and your verdict must be for the defendant."

"The jury may look to the usages of the trade or business to learn the real intentions of the parties."

I refuse to give the fourth.

Now, gentlemen, I have gone all over this case. You will give it due consideration, and enter upon your duties with a determination to give such a verdict as the facts disclosed by the evidence, and the law applicable to them, will justify.

The evidence disclosed presents for your decision this inquiry, upon which the case turns:

Did the contracts in evidence intend an actual delivery of wheat, or were they mere subterfuges for speculations in margins?

This is the simple issue upon which the case turns. If the former, plaintiffs are entitled to recover. If the latter, your verdict should be for the defendant.

This is a very expensive litigation, involving a great deal of money. It is an important case, and will settle not only private rights here, but matters in which the public are interested, and I hope you will go through with it with a determination to arrive at a verdict. You have been selected to settle the controversies here involved. I hope you will exercise due forbearance, not yielding your convictions, but enter into the jury-room with the determination to settle the controversy. Let it end with your verdict, gentlemen, so far as the questions of fact are concerned.

C. K. Davis, for plaintiff.

Gordon E. Cole, for defendant.

OHLQUIST and another *v.* JOHN V. FARWELL & Co. and others.

(District of Iowa, Northern Division. 1882.)

1. REMOVAL OF CAUSE — TRESPASS — CAUSE REMANDED. — Where an action of trespass was commenced in a state court against a sheriff for the wrongful seizure of goods of plaintiffs as the property of an attachment debtor, and the creditors of such debtor, citizens of another state, procured themselves to be substituted as defendants in the state court in place of said sheriff, and removed the cause to the United States circuit court, *held*, on motion to remand, that the cause be remanded to the state court.
2. SAME — PLAINTIFF CANNOT BE DEPRIVED OF ALL REMEDY. — Where the real cause of action is between citizens of the same state, citizens of another state cannot, by procuring themselves to be substituted for the defendant, procure the removal of the cause into the federal court, and thereby deprive the plaintiffs of their remedy against the original defendant for a trespass committed by him.

Motion to remand.

On the nineteenth day of December, 1881, said John V. Farwell & Co., and other creditors, commenced actions against P. & N. Ohlquist by attachment in the district court of Linn county, Iowa. It is alleged and claimed by the plaintiffs in the present suit that the sheriff of Linn county did not levy the attachments upon the property of said P. & N. Ohlquist, but at the request of said Farwell & Co. and others, said attachments were levied upon a stock of goods and merchandise belonging to and in the possession of N. A. Sunberg and F. B. Ohlquist; that said N. A. Sunberg and F. B. Ohlquist immediately served notice in writing upon said sheriff that they were the owners of said property, and demanded the same; that John V. Farwell & Co. and others having furnished the sheriff with a bond of indemnity, he refused to release the property. It appears that thereupon, on the twenty-ninth day of December, 1881, said N. A. Sunberg and F. B. Ohlquist commenced, in the district court of Linn county, actions of trespass against the sheriff, claiming damages for the seizure of said property; that at the

March term of said court for the year 1882, B. F. Seaton, said sheriff, and said Farwell & Co., Becker, and Sherer, Sherk & Co., presented their petition to said court asking that said Farwell & Co., Becker, and Sherer, Sherk & Co., might be substituted in the place and stead of said sheriff as defendants in said action, and that said sheriff might be discharged; whereupon an order was made by said court discharging said sheriff and substituting said Farwell & Co., Becker, and Sherer, Sherk & Co., as defendants in said action. To this order the plaintiffs at the time excepted, and thereupon said Farwell & Co., Becker, and Sherer, Sherk & Co., filed their petition for removal of said cause to this court, which petition was granted and said cause was transferred accordingly, the plaintiffs excepting to the order of transfer. And now, at the April term of said circuit court of the United States, the plaintiffs move to remand said cause to the state court.

J. B. Young and *Welsh & Welsh*, for the motion.

Herrick & Co., *O. P. Shiras* and *E. Keeler*, *contra.*

LOVE, *District Judge.*— Was this cause rightfully removed into this court? If it was, the legal results are certainly most extraordinary, not to say unjust.

The plaintiffs here sued the sheriff of Linn county, in trespass for — as they alleged — seizing the plaintiffs' property by a writ of attachment issued against other and different parties. If the plaintiffs' allegations be true, the sheriff dispossessed them of their property without any warrant of law whatever. Most certainly, if this was a wrongful seizure, the sheriff ought to respond to the plaintiffs for damages, and look for indemnity to the attaching creditors, at whose instance and in whose interest he made the seizure. Nothing, at all events, can be clearer, in point of law and in common justice, than that the plaintiffs ought to have a

right to be heard somewhere — in some tribunal — against the sheriff in such a case. To deny them this common right would certainly be to inflict upon them a flagrant wrong. Now, if the plaintiffs' motion to remand be denied, he will be deprived of all right to assert his cause against the sheriff — a public ministerial officer, alleged to have committed a trespass upon the plaintiffs — in any tribunal whatever.

These defendants, who were the attaching creditors in the state court, intervened in the action against the sheriff, and obtained an order discharging the sheriff from that action and substituting themselves. To this order the plaintiff excepted; and surely, whether the action of the district court of Linn county was right or wrong, he had a right to be heard on his exceptions before the supreme court. And if, upon a hearing in the supreme court, the order of the court below had been reversed, the sheriff would have been retained as a party to the plaintiffs' action, and the cause could not have been removed into this court, because the sheriff and the plaintiffs are both citizens of Iowa. But these defendants, having succeeded in getting the sheriff out of the case, and being themselves citizens of Illinois, immediately removed the cause into this court, upon the ground that the sole continuing controversy was between themselves and the plaintiff, citizens of different states. The removal carried the whole case into the federal court, it being now well settled that the whole cause, and not any part of it, must be transferred by the removal. Nothing remained in the state court upon which it could act, and there was no cause there from which any appeal could be taken to the supreme court of the state. Thus the defendants, by their voluntary intervention and by the removal, deprived the plaintiffs of their action against the sheriff in the court below, and of their rights to a hearing upon their exceptions in the supreme court of the state.

The defendants have now got the plaintiffs into this court. What is the result? The sheriff is out of the case entirely,

and the defendants have succeeded in depriving the plaintiffs of any hearing whatever against him in the district court of Linn county, in the state supreme court, and in this court. This court cannot hear the plaintiffs, to assert anything whatever against the sheriff, because the sheriff is not here. If he were here, his presence would oust the jurisdiction, and the court could do nothing but remand the cause to the state court. Thus, though the sheriff may, at the instance and request of the defendants, have committed a flagrant trespass against the plaintiffs, he goes entirely free, and the injured party has no redress whatever against him. The sheriff is personally within the jurisdiction; he may have property here; he is presumably a responsible man; he has, at all events, given bond, with approved sureties, for the indemnity of injured parties. The plaintiffs sought their remedy, as they had a clear right to do, against the sheriff, a public officer, who committed the alleged trespass. What is the result of the intervention and removal? The plaintiffs are driven to prosecute their suit in this court against non-resident parties, who may be insolvent, and whose property, if they have any, is, in all probability, beyond the jurisdiction and process of the court.

It is our judgment that it was not competent for the defendants to displace and supplant the original defendant and remove the cause, so as not only to deprive the plaintiffs of all remedy against him, but of a hearing of his cause in any court whatever.

The motion to remand is sustained.

McCrary, *Circuit Judge*, concurs.

Bussey *v.* Memphis & Little Rock R. Co.

(Eastern District of Arkansas. April, 1882.)

1. Railroad Companies as Carriers.— A railroad company is not bound to undertake the carriage of goods beyond the terminus of its road; but if it does enter into a contract to do so it is bound by it, and is under the same obligation to furnish means of conveyance beyond the line of its own road as it is upon it.
2. Same — When May Refuse Freight — Duty of.—A railroad company may rightfully decline to receive freight offered, when it has not the requisite rolling stock and equipments to carry it without delay; but if it receives goods for transportation it can only escape responsibility for delay by a previous accumulation of freight at its depots, by acquainting the shipper, when he offers goods for carriage, with the facts, and affording him the option of acquiescing in the delay, or seeking some other line of transportation.
3. Same — Connecting Lines — Through Bills of Lading — Delay in Transportation.— Through bills of lading impose on the railroad company, as carrier, the obligation to provide means of transportation for the goods shipped to their ultimate destination without delay, and it is no excuse for the non-performance of this duty that it could not procure transportation by boat by reason of a previous accumulation of freight, of which it was advised when it received the goods for transportation.
4. Same — Measure of Damages for Delay.— The measure of damages for delay by a carrier in the transportation and delivery of goods at their point of destination is the difference in the market value of the goods at such destination on the day they ought to have been delivered, and the market value on the day they were delivered.

Caldwell, *District Judge.*— Between the seventh and the twenty-fifth of November, 1878, the plaintiff's agent delivered to the defendant company at Little Rock, and other stations in that vicinity, six hundred and two bales of cotton for shipment, consigned to the plaintiff at New Orleans. The bills of lading specify and guaranty a through rate of freight to New Orleans, and are indorsed in ink, "via river from Hopefield," and are identical in every respect, except that some declare the cotton is received "to be transported from Little Rock, Arkansas, to New Orleans, Louisiana, and delivered to the consignee, or a connecting common carrier,"

while in others "Hopefield, Arkansas," is inserted in lieu of "New Orleans, Louisiana," where those words occur in the above extract. The plaintiff having shown an unreasonable delay in delivering the cotton, the burden is cast on the defendant to show some fact which will justify or excuse that delay. This the answer attempts to do by stating that a quarantine, established to prevent the spread of yellow fever, stopped the defendant's road from running from the fourteenth of August to the twenty-eighth of October, and that owing to this fact, at the time plaintiff's cotton was received "large quantities of freight had accumulated at Little Rock and other depots upon its line for transportation to Hopefield, and other large quantities had accumulated in the country, and was afterwards delivered for transportation, and that owing to such accumulation it could not forward said cotton upon the day of its reception, but that it did carry said cotton to Hopefield as soon as it could do so under the circumstances." And, touching any delay at Hopefield, the answer states that previous to the receipt of the cotton a quarantine had been in force along the Mississippi river, which prevented boats from navigating that river between Cairo and New Orleans, and that during the existence of the quarantine "large quantities of freight accumulated on the banks of the river for transportation to New Orleans, and boats coming down the river to Hopefield came laden to their utmost capacity, and could take no more freight; and said cotton was forwarded from Hopefield by the very first boat that could take it." These statements in the answer accord with the facts in the case and are fatal to the defense.

A railroad company is not bound to undertake the carriage of goods beyond the terminus of its road, but if it does enter into a contract to do so it is bound by it, and is under the same obligation to furnish means of conveyance beyond the line of its own road that it is upon it. And a railroad company which has the requisite rolling stock and

equipments to carry without delay the freights usually offered, is not bound to receive goods which it is not at the time able to carry, by reason of some accidental or extraordinary increase in the public demand for transportation, occurring without the fault of the company. In such case the company may rightfully decline to receive freights offered, and which it cannot carry without delay. But if it does receive the goods, it can only relieve itself from responsibility for delay in carrying them, resulting from a previous accumulation of freight at its depots for transportation, by acquainting the shipper with the facts when he offers his goods for carriage, and affording him the option of acquiescing in the delay, or seeking some other line of transportation for his goods. There were other lines open to the plaintiff, and his agent testifies that he would have shipped the cotton by some other line had he not been advised that it would go forward over defendant's line without delay. The through bills of lading undoubtedly imposed on the company the obligation to provide means of transportation for the cotton from Hopefield to New Orleans without delay. Its engagement to deliver the cotton in New Orleans bound it to furnish the means of carriage for that purpose. Under such a contract it had no right to rely on boats casually navigating the river. And the carriage must have been continuous, and without delay, except the delay usually incident to transferring freight from the cars to the boat at Hopefield. If the cotton was detained an unusual length of time at Hopefield, the defendant cannot escape responsibility for such delay on the plea that no boats offered to take it. The obligation rested on the defendant to furnish boats to transport it, and it is no excuse for the non-performance of this duty that it could not procure transportation by boat by reason of a previous accumulation of freight, of which it was advised when it received the cotton.

On the face of the through bills of lading, therefore, it was the legal duty of the defendant, on the arrival of the

cotton at Hopefield, to ship it thence by boat to New Orleans without delay, and to provide boats for that purpose. The company had no right to trust to adventitious aid to carry out its contract, and if it did so and was disappointed, the plaintiff is not to be made to suffer thereby.

As to the Hopefield bills of lading it may be observed: (1) That the difference in the bills of lading seems not to have been regarded as of any moment by the parties; they were issued by the company and received by the shipper indifferently, as meaning the same thing, and as having the same legal effect. (2) The plaintiff's agent testifies distinctly that the company's agent assured him the cotton would be shipped through to New Orleans without delay, and the cotton was delivered to the defendant on the faith of such assurance. (3) All the bills of lading fixed and guarantied a through rate of freight to New Orleans, which precluded the shipper from making a contract with any other carrier to carry the cotton from Hopefield.

The defendant had a right to obtain the best freight rates it could for carrying the cotton from Hopefield to New Orleans, but it could not hold the cotton to obtain favorable rates, and in order that it might make more money out of its contract with the plaintiff, as the plaintiff contends was done. Upon the facts in the case, all the bills of lading should probably be treated as the parties treated them at the time — as through bills of lading, and imposing obligations on the company accordingly. But whether this is a sound view or not need not be determined. Nor is it necessary to decide what the legal effect of the Hopefield bills of lading would be, taken by themselves, and disconnected with the other facts in the case. On the pleadings and proofs the defendant is in no plight to split hairs on that question or insist on its decision. The liability of the company is fixed before that question is reached, and without any necessary reference to it.

The plaintiff did not deliver his cotton to defendant upon a contract that it would be shipped when convenient, or

when an indefinite quantity of freight then in its depot awaiting shipment had been forwarded. If the company had discharged its legal duty to the shipper, it would have advised him of the fact that there would be delay in forwarding the cotton when he offered it for shipment. Not having done so, but having concealed from the shipper this fact, it is responsible for all delay occurring from causes then existing and within its knowledge. The whole delay, whether it occurred before or after the cotton arrived at Hopefield, was the result of the wrongful act of the company in receiving the cotton for immediate transportation, and inducing the shipper to believe it would be carried to its destination without delay, and issuing bills of lading accordingly, when it knew it could not comply with its contract in this regard, and that unusual delay would occur not only on its own road, but as well on its connecting line, by reason of the previous accumulation of freights.

The conclusion reached is supported by adjudged cases. *Tucker* v. *Pacific R. Co.* 50 Mo. 386; *Faulkner* v. *South. Pac. R. Co.* 51 Mo. 311; *Hellwell* v. *Grand Trunk R'y*, 7 Fed. Rep. 69.

It is conceded that a reasonable time for the transportation of cotton from Little Rock to New Orleans, by the defendant's road to Hopefield and thence by boat to New Orleans, is ten days. A much longer time than this elapsed between the delivery of the cotton to the railroad and its arrival in New Orleans, during all of which time cotton was declining in price.

The measure of damage is the difference between the market value of the cotton in New Orleans on the day it ought to have been delivered and the market value the day it was delivered. This difference is shown by the testimony of the cotton factors to be $827.37, for which let judgment be entered.

W. G. Whipple, for plaintiff.

B. C. Brown, for defendant.

BURHAM *v.* FRITZ and others.

(District of Iowa, Central Division. 1882.)

1. REDEMPTION — JUNIOR LIENHOLDER. — Under the statutes of Iowa the holder of a simple judgment lien has not an equitable right to redeem from a senior lienholder after the execution of a sheriff's deed made pursuant to a sale thereunder.
2. SAME — RULE OF PROPERTY — STATE DECISIONS TO GOVERN. — The decision of the supreme court of a state as to the rule of property will be followed by the federal courts sitting within the district included in such state.

This cause is now before the court upon the complainant's demurrer to the cross-bill of the respondent, B. F. Elbert.

The complainant obtained in this court a decree for the foreclosure of a mortgage against the mortgagor and all incumbrancers except said B. F. Elbert, who was named in the bill, but not served with process. On the twenty-ninth day of August, 1879, the master sold the mortgaged premises in pursuance of the decree. On the twenty-fourth day of April, 1878, prior to the foreclosure proceedings, said B. F. Elbert recovered a judgment in the district court of Monroe county, Iowa, which became a lien on the land embraced in the foreclosure and sale. The complainant was the purchaser at the master's sale, and on the fifteenth day of September, 1879, he received a deed for the land in question and took possession of the same. After these proceedings, to wit, on the thirtieth day of January, 1882, the complainant caused service to be made on Elbert for the purpose of cutting off and barring his right of redemption. The latter, on the third day of April, 1882, answered the bill and filed a cross-bill, praying that the complainant should be required to account for rents and profits, and the respondent allowed to redeem. To this cross-bill the complainant demurs, and among other grounds of demurrer assigns the following: "That a junior judgment creditor cannot in this state, in equity, redeem from a sale under a foreclosure of a prior

mortgage after the expiration of the statutory time of redemption."

Leyman & Clark, for demurrer.

Perry & Townsend, contra.

LOVE, *District Judge.*—The question thus presented has, we think, been fully decided by the supreme court of the state of Iowa in *Diddy* v. *Risser*, 55 Iowa, 699. Although that case was decided upon grounds by no means satisfactory to our own judgment, it is our duty to follow it as a law of property in this state. It is too obvious for discussion that we cannot, by disregarding the rule laid down in that case, set up a different rule of property for the federal courts in this district.

We are wholly unable to distinguish the case of *Diddy* v. *Risser* from the case before us upon any material grounds of fact or law. The only difference between the two cases consists in the fact that in *Diddy* v. *Risser* the sale from which the junior judgment creditor sought to redeem was under a decree foreclosing a mechanic's lien, while in the present case the sale was under a decree foreclosing a prior mortgage. We cannot see, however, that this fact makes any difference in the principle of the two cases. Indeed, the supreme court of Iowa, in its opinion, does not proceed upon any such distinction, but puts its judgment upon the broad ground that "the holder of a simple judgment lien never had an equitable right to redeem from a senior lienholder after the execution of a sheriff's deed made pursuant to a sale thereunder." We suppose that the supreme court of Iowa used this language with reference only to the jurisprudence of the state of Iowa. As a proposition of law it certainly is not true, if applied in the wide and comprehensive sense which the words imply. The rule was, I think, quite otherwise at common law. 2 Jones, Mortg. § 1436,

and cases there cited; 4 Kent, 162; Story's Eq. § 1053; *Brainard* v. *Cooper*, 10 N. Y. 356; Powell, Mortg. 251.

It would seem, in view of these and other authorities, that the doctrine of the Iowa supreme court can be sustained only upon the ground that we have in Iowa a statute giving the right of redemption, and prescribing the time within which it must be exercised. Perhaps it might be well argued that it is the policy of our statute to require the judgment creditor holding a junior lien to make his redemption promptly within the prescribed time, and not allow him to disturb and harass a purchaser long after the time of sale, and at any time within the statute of limitations. But, however this may be, we are bound by the rule as laid down by the supreme court of the state.

The demurrer to the cross-bill will be sustained; but since the counsel for the complainant in the cross-bill have made no reference to the case of *Diddy* v. *Risser*, the court will be willing to hear them in writing upon the application of that case to the present controversy.

Demurrer sustained.

GRIESSER and others *v.* MCILRATH, Receiver, etc.

(District of Minnesota. June, 1882.)

1. DISCRIMINATION IN RAILROAD FREIGHTS — DAMAGES, HOW COMPUTED. — Where, at a former term of the court, it was decided that the receiver of a railroad company, by the adoption of a contract with a third party, and settlements with him thereunder, had discriminated against the plaintiffs in the rates charged them for transportation of wheat and grain over the railroad operated by him, contrary to the provisions of the state statute, and that plaintiffs were entitled by law to have their grain transported over said road at rates which would put them on an equal footing with said third party for like transportation, and it was referred to a special master to take an account of the amount of such unfavorable discrimination, and to report the result of such examination, *held*, that the

amount of the fund which, under the contract, could be used to pay such third party's commissions, and all expenses incident to the business and the receiver's freight, is the difference between the prime cost of the wheat shipped and the net proceeds of sales, deducting freights and charges incurred upon other roads, and after the shipment left the receiver's road; and that the amount of discrimination is the difference between such amount, after deducting therefrom expenses, compensation, rent of warehouses, interest, exchange, insurance, and the outlay at way stations made by the receiver to secure the trade, and the amount of the freight charged to such third party according to tariff rates; and that a decree be entered accordingly.

NELSON, *District Judge.*—At the December term, 1877, this court decided that the receiver, by the adoption of the contract with J. C. Easton of August 15, 1872, and the settlements with him thereunder, had discriminated against the plaintiffs in the rates charged them for transportation of wheat and grain over the railroad operated by him between May 6, 1873, and March 4, 1874, contrary to the provisions in that behalf of the act of the legislature of the state of Minnesota, approved March 6, 1871, and that the plaintiffs were entitled by law to have their grain transported over the said railroad at rates which would put them on an equal footing with the said Easton for like transportation of grain under the said Easton contract or agreement, which is hereinafter set forth in full, and to a decree for the amount of such unfavorable discrimination, and it was referred to George B. Young, Esq., a special master, to take an account of the amount of such unfavorable discrimination, and to report the result of such examination, together with all the *data* necessary to enable the court to render a final decree. The master was granted power and authority to examine, if necessary, the parties, their books, and such witnesses as the parties might severally produce before him, in addition to the proofs already taken. The contract or agreement, by the adoption of which the receiver did discriminate against the plaintiffs, is in the following words:

"Memorandum of an agreement made this fifteenth day of August, 1872, between J. C. Easton, party of the first part, and the Southern Minnesota Railroad Company, party of the second part, witnesses: That J. C. Easton, party of the first part, agrees to furnish warehouses and elevators, at all stations on the line of the Southern Minnesota Railroad, suitable for handling grain and other produce, at fair and reasonable rents, and employ agents and men to buy and handle grain and other produce, at said stations, in the interest of, and at such prices, as the president and manager of the Southern Minnesota Railroad Company may direct, and shall have such grain and other produce sold in Milwaukee, or elsewhere, as may be agreed, at a cost not exceeding one cent per bushel for grain, and at corresponding rates of commission for other produce.

"Said J. C. Easton, party of the first part, further agrees that he will employ competent buyers and agents, and will be responsible for the honest and faithful performance of their duties in buying, handling, grading and management of grain and other produce, and promptly pay any damages occurring through a failure to perform such duty, and will keep correct account of all expenses attending the performance of this business, and render an account of the same once a week, when all settlements shall be made and differences paid. The Southern Minnesota Railroad Company, party of the second part, in consideration of the foregoing, and the energetic superintendence of this business by the party of the first part, agrees to allow the party of the first part three-quarters of a cent per bushel profit for all grain, and three-quarters per centum profit on the gross sales of the other produce, handled under this contract, and also to pay the expenses of buying and handling the same, and ten per centum on all money used in the transaction of said business.

"The object of the foregoing agreement is to enable the Southern Minnesota Railroad Company to regulate and control the business along its line, and to sustain the rates of

freight, and is to be explained as follows: J. C. Easton is to buy and own the grain and other produce, but at prices dictated by the Southern Minnesota Railroad Company. He is to make immediate sales by telegraph, and after paying the costs of handling and necessary and legitimate expenses, added to three-quarters of a cent per bushel on grain, and three-quarters of one per cent. on the gross sales of other produce, as profit to himself, is to pay the residue to the Southern Minnesota Railroad Company as their freights. Settlements to be made once a week, and all differences paid, and this agreement may be terminated by either party at any time.

"In testimony whereof the parties hereunto have signed and delivered the same this fifteenth day of August, 1872.

"J. C. Easton. [Seal.]

"The Southern Minnesota Railroad Company,

"By Clark W. Thompson, President."

Sections 4 and 7 of the act of legislature of the state of Minnesota, approved March 6, 1871, entitled an "An act to regulate the carrying of freight and passengers on all railroads in this state," reads as follows:

"Sec. 4. It shall be the duty of all railroad companies and corporations in this state to receive all freights of the kind mentioned in this act at any depot or station of such company or corporation, whenever brought to such depot for transportation, and to provide suitable places for the storage and reception of such freight at all of its depots and stations. And all railroad companies and corporations shall furnish equal facilities for transporting, and shall transport freights of every description in this state to and from warehouses or elevators other than those owned by any such company or corporation at the same rates as from warehouses or elevators owned by such company or corporation, and shall make no discrimination in favor of nor against any warehouse or elevator."

"Sec. 7. That all railroad companies or corporations doing

business in this state shall transport all freights ordered for transportation within a reasonable time, and in the order of the reception of the same for carriage; and if any railroad company or corporation shall transport freights of any description for any person or persons, corporation, company or association, at rates less than are provided in this act, then such company or corporation shall thereafter transport freights of the same description over its line of railroad for all other persons at the same reduced rates during the time such discrimination is in force."

The master has given great attention to the case, and furnished full *data* upon which he bases his report, and finds that the amount of discrimination in favor of Easton under the contract is three and ninety-seven one hundredths cents on each and every bushel shipped by him at each of the stations where the plaintiffs made shipments, during the period of their shipments. The freight charged to Easton according to tariff rates is $193,403.48. The only fund which under the contract could be used to pay Easton's commissions, and all expenses incident to the business along the line of the road and the receiver's freights, is the difference between the prime cost of the wheat shipped and the net proceeds of sales, deducting freights and charges incurred upon other roads, and after the shipment left the receiver's road. The master has taken the purchase records, and on examination finds the amount of wheat purchased one million six hundred and sixty-eight thousand three hundred and twenty-two and fifty-eight sixtieths bushels, at a cost of $1,534,106.66, and the quantity sold one million six hundred and sixty-eight thousand twenty-three and thirty-six sixtieth bushels, for the net price of $1,714,573.13, and deducting the prime cost from the net proceeds of the sales, there is available for payment of freight, etc., $180,466.47.

The salaries and wages paid by Easton under the contract, according to the latter's testimony, which he was entitled to be allowed in the purchase of wheat, is $35,000, and the

compensation for rent of warehouses, interest, exchange and insurance, $18,550; and his commission at three-fourths per cent. per bushel to September 1, 1873, and one per cent. per bushel from September 1, 1873, amounts to $14,884.15. The aggregate of these sums must be deducted from the $180,446.47, before the receiver was entitled to be paid for freight, which gives the result:

Difference between prime cost and net sales....		$180,446 47
Expense.....	$35,000 00	
Compensations	14,884 15	
Rent of warehouses, interest, exchange and insurance.....	18,550 00	
		68,434 15
Balance.....		$112,012 32

There is another item which, it is claimed, should be allowed Easton as a credit on freight charges, and be added to the balance found of $112,012.32.

It appears from the evidence that at several small stations where wheat could be purchased and a market opened which might be productive of substantial benefit to the receiver's road, some $12,000 of expenses were incurred. The business at these stations did not pay expenses at the time, but the receiver, in his effort to secure the trade, undertook this outlay, and the item has been allowed by the master as a credit to apply on Easton's freight charges. I think the receiver was justified in making this expenditure, and the master very properly has so reported. This would increase the amount to be applied on freight charges to $124,012.32. The freight charged to Easton, according to the regular tariff, is found to be $193,403.48. The deficiency is $69,391.16, which represents the discrimination on Easton's wheat, amounting to three and ninety-seven one-hundredth cents per bushel. The answer admits the shipments made by the complainants, and the number of bushels. A decree will be entered in

their behalf and against the defendant, and it is referred to the clerk, as master, to make the computation and report.

McCrary, *Circuit Judge*, concurring.

Gilman & Clough, for plaintiffs.

Henry J. Horn, for defendant.

[1] See *Hays* v. *Pennsylvania R Co.* 12 Fed. Rep. 309, and note, p. 314; *Texas Express Co.* v. *Texas & Pac. R. Co.* 6 Fed. Rep. 426; *Same* v. *Inter. & Grand Northern R. Co.* id.; *Tilley* v. *Savannah, F. & W. R. Co.* 5 Fed. Rep. 641.

Percival *v.* McCoy and others.

(District of Iowa, Western Division. 1882.)

1. Bond of Indemnity — Parties — Joinder of to Recover the Penalty. — A party cannot sue alone on a bond of indemnity made to himself and other obligees on a prior delivery bond without showing that he alone has received injury by the breach thereof, and therefore that he brings the suit without joining the other obligees as plaintiffs. He cannot set out a bond as running to or as made to himself alone, and give in evidence an instrument made to himself jointly with other obligees.
2. Same — Misrecital in Pleading — Variance. — In an action upon an indemnity bond, given to indemnify the sureties on a prior delivery bond, a misrecital of the amount of the penalty in the delivery bond, of the parties in it to be indemnified, and of the terms and conditions of the delivery to be made under it, is a fatal variance.
3. Same — Variance Not Cured by Averment of Mistake. — Such variance cannot be cured by an averment that the indemnity bond sued on was executed by mistake and inadvertence, without alleging and proving that the mistake was mutual, and that it was the intention of the parties to the indemnity bond to indemnify the sureties on the prior delivery bond.
4. Same — Liability of Sureties — Remedy in Equity. — The liability of sureties cannot be enlarged or changed by averment in the pleading, whatever the understanding of the pleader may have been; and where an indemnity bond has been executed by mistake or inadvertence, the proper remedy is by a bill in equity to reform it and make it conform to the mutual intention of the parties.

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[1] From *Federal Reporter*.

At law.

This is an action at law upon a penal bond in the sum of $12,000 executed by said defendant McCoy as principal, and the other defendants as sureties, to George Bebbington, Robert Percival, J. P. Williams, J. E. Rudd and Marshall Key. The bond thus sued on purports upon its face to be intended to indemnify said obligees against their liability as sureties for McCoy upon a certain delivery bond executed by them with said McCoy to the government of the United States to secure the delivery to McCoy of his distillery, which the government had seized. The case is now before the court a second time upon the demurrer of the defendants to the plaintiff's amended and substituted petition.

The petition states that in the month of November, 1868, the government of the United States seized the distillery of the defendant McCoy for an alleged violation of the revenue laws; that McCoy, with the plaintiff and one John E. Rudd as sureties, executed a delivery bond to the United States in the penal sum of $6,705; that the property was released on said bond, and the possession of the same delivered to the plaintiff to secure him against loss as surety on said delivery bond.

It is further alleged that McCoy, being desirous to remove said distillery from Iowa to Omaha, Nebraska, executed and delivered to the plaintiff a bond in the sum $12,000, with the other defendants, James G. Megeath, John Davis and Jesse H. Lacy, as sureties, conditioned that the said J. C. McCoy would hold the plaintiff and others, his co-sureties, harmless from all liability on their said delivery bond to the United States, and thereupon that the plaintiff accepted said indemnifying bond, waived his right to retain possession of said distillery property, and surrendered the same to McCoy to be removed to Omaha. Both the delivery and indemnifying bonds are exhibited by copy and made a part of the petition.

It is further alleged that the government obtained a decree of condemnation against the distillery property; that Mc-

Coy failed to deliver the same to the marshal, or pay its appraised value; that a summary judgment was therefore, according to the practice of the court, entered against the plaintiff and said McCoy and Rudd, on the delivery bond, for the sum of $6,705, the amount of the penalty thereof, and $183.75 costs; that execution was issued upon said judgment and levied upon the property of the plaintiff, Percival, and that he has been compelled to pay the same.

Said plaintiff, Percival, therefore sues the defendants as obligors of said indemnity bond, claiming against them the sum he has been compelled to pay as principal, interest and costs upon said judgment.

It appears by inspection of the exhibits that the indemnity bond on which the suit is brought does not run to the plaintiff alone, nor to the plaintiff and his co-surety, Rudd, in the delivery bond, but to George Bebbington, Robert Percival, J. P. Williams, J. E. Rudd and Marshall Key, none of whom, except said Percival and Rudd, are parties to the delivery bond. The plaintiff alone, of the obligors just named, is a party to the present suit.

The plaintiff alleges that it was recited by mistake and inadvertence in the indemnity bond that the delivery bond is in the sum of $10,000, whereas it is only for the sum of $6,705; that it was also by inadvertence and mistake recited that said delivery bond was executed by said McCoy and George Bebbington, Robert Percival and J. P. Williams as sureties, whereas, in truth and in fact, it was executed by McCoy as principal, and the plaintiff and Rudd as sureties; and that it was also recited by mistake and inadvertence in the indemnity bond that the delivery bond was conditioned that the obligors in the same should return said distillery property, if judgment should be obtained against it, when in fact said delivery bond was conditioned that the said McCoy should keep and return said property in as valuable and good condition as it was at the time of the seizure, or pay an amount equal to the appraised value of the same, and

otherwise in all things abide and perform the orders and decrees of the court.

Sapp & Lyman, for plaintiff.

J. M. Woolworth, for defendants.

LOVE, *District Judge.*— After much consideration it seems to me that to maintain the case now stated in the plaintiff's amended petition at law and before a jury, would involve great if not insuperable difficulties. The bond sued on runs to George Bebbington, Robert Percival, J. P. Williams, J. E. Rudd and Marshall Key, as obligees, and there is no allegation in the amended and supplemental petition that it was so made by mistake. On the contrary, it is averred that said defendants McCoy, Megeath, Davis and Lacy executed and delivered to the plaintiff (Percival) the bond in question. It seems clear that if this bond were offered in evidence under such an allegation there would be a fatal variance between the instrument as set out and the proof. Granting that the plaintiff may sue alone under section 2552 of the code, without joining the other obligees, he must, nevertheless, set out and state the bond correctly, with proper allegations, showing that he alone has received injury by the breach, and therefore that he brings the suit without joining the other obligees as plaintiffs. But he cannot set out a bond as running to or as made to himself alone, and give in evidence an instrument to himself jointly with other obligees.

It is claimed that the bond sued on was given to indemnify the sureties in the first bond, namely, Percival and Rudd, against liability accruing to them from a breach thereof. If so, it must have been intended that the bond sued on should run to Percival and Rudd, whereas its expressed obligees are Bebbington, Percival, Williams, Rudd and Key. If this occurred by mistake, it ought to be shown by proper averments. If it was the intention of the defend-

ants to bind themselves, in the bond sued on (as indicated by its express terms), to indemnify Bebbington, Percival, Williams, Rudd and Key against loss accruing to them under a bond executed by them, I do not see how the defendants can be made responsible to the plaintiff for loss accruing to him by reason of the breach of a bond executed by him and Rudd alone. The defendants can only be made responsible, if at all, by the plaintiff's alleging that it was the defendants' intention to bind themselves to indemnify the plaintiff and Rudd, and to execute the bond sued on for that purpose, and that by mutual mistake the bond sued on failed to express that intention. For it is quite obvious that the defendants might have been willing to execute a bond to indemnify Bebbington, Williams, Percival, Rudd and Key, and yet wholly unwilling to sign such an instrument to indemnify Percival and Rudd alone. One of the defendants may have been induced to execute the bond for the interest of one of the several obligees; another for some other; and a third for a still different obligee. One of the defendants may have signed the bond in the belief that one or more of the obligees, in whom he had confidence, would see that McCoy should fulfil the conditions of the original bond; another, upon his faith that other and different obligees would see to the performance of its conditions. It by no means follows, therefore, from the fact that these defendants signed the bond in suit to save harmless the several obligees who appear upon the face of it, that they would have executed it to indemnify the plaintiff alone, or the plaintiff and Rudd; and the only way to make them liable, if it can be done at all, is by averring and proving that they intended to bind themselves to the actual sureties in the original bond for their indemnity, and that this intention was, by mistake, not expressed in the instrument which they signed.

It must be remembered that the bond sued on purports to bind its obligors to protect the plaintiff and other sureties against loss accruing to them as sureties to a previous bond.

The bond sued on stipulates substantially that the principal in the first bond shall perform its conditions, and that the obligors in the second bond will be responsible for any loss arising from the default of the principal in the first bond. Both bonds are exhibited by copy. But the terms and conditions of the first bond are so essentially misrecited in the second bond, that upon the face of the two instruments, as shown by the exhibits, there is no identity between the first bond and the bond recited. The plaintiff seeks to establish this identity by the averments of his amended and substituted petition. He sets out the first bond, and shows that he suffered loss by reason of the breach of its conditions. This first bond is in the penal sum of $6,705, but the bond sued on recites that it is given as indemnity against a prior bond for the sum of $10,000.

Again, the first bond purports on its face to be executed by James C. McCoy as principal, and Robert Percival and John E. Rudd as sureties. The bond sued on runs to George Bebbington, Robert Percival, J. P. Williams, J. E. Rudd and Marshall Key, and it recites that Bebbington, Percival and Williams had become sureties in the previous delivery bond, and it stipulates to indemnify Bebbington, Williams, Percival, and all other sureties on said first bond against liability on the same.

The condition of the first or delivery bond is that McCoy, the principal, shall keep and return said property in *as valuable and good condition as it was when seized, or pay an amount equal to the appraised value of the same, and in all things abide and perform the final order or decree of the court.* The condition of the bond indemnified against, as recited in the bond sued on, is that McCoy, with Bebbington and Percival and Williams as sureties, had executed a delivery bond to the United States, *conditioned that they would return the property seized if a judgment should be obtained against it.*

Thus it appears by the face of the two bonds as exhibited that the obligors in the second bond did not undertake to

indemnify the plaintiff against the bond under which he suffered loss, but against a bond radically and essentially different; different in the penal sum, in the parties, and in the conditions to be performed. Here is evidently a wide gap to be filled, and the plaintiff attempts to fill it by the allegations of his amended and substituted petition. He avers that these several recitals in the bond sued on were made by mistake and inadvertence. He avers that in writing said bond of indemnity, it was recited by mistake that the first bond was in the penal sum of $10,000, whereas, in fact, it was in the sum of $6,705; that it was also by mistake recited that the first mentioned bond was executed by said McCoy and George Bebbington, Robert Percival and J. P. Williams as sureties, when in fact it was executed by J. C. McCoy, with Robert Percival and John E. Rudd as sureties; and that it was also recited by mistake that the first mentioned bond was conditioned that the obligors should return said property if a judgment should be obtained against it, when in fact said bond was conditioned that J. C. McCoy should keep and return said property in as valuable and good condition as it was when seized, or pay an amount equal to the appraised value thereof, and in all things abide and perform the final order and decree of the court. Waiving at present the question whether or not the alleged mistake can be corrected by averment and proofs before a jury in an action at law, it is sufficient to say that the averments themselves are wholly inadequate and insufficient.

It is not alleged that the mistake in the recitals was mutual, or that it was the intention of both parties that the defendants should be bound to indemnify the plaintiff against loss under the first-named bond, but that this intention was not expressed in the bond sued on by reason of a mistake common to both parties. Certainly a written instrument cannot be changed or reformed by parol evidence, either at law or in equity, upon the ground of mistake and in the absence of fraud, unless the mistake was mutual; because it is

absolutely *incompetent* for any court to *make* a contract for the parties. For aught that appears by the plaintiff's averments, the mistake was wholly on his part, and the defendants intended to bind themselves exactly as the bond which they signed imports. If the defendants intended to bind themselves to indemnify the plaintiff against liability under just such an instrument as the bond sued on recites, with the conditions recited in the same and none other, their liability cannot be enlarged or changed by averment, whatever the understanding of the plaintiff may have been. It is conceivable that the defendants may have been quite willing to undertake that McCoy should return the property simply, and yet entirely unwilling to stipulate that he would return it in as valuable and good condition as it was when seized. They might well assume that he would be able to perform one of these things and not the other, and that he would in good faith perform what he might be able to do.

It is not averred that these defendants, who are all except McCoy sureties, ever saw the first or delivery bond, or that they had any knowledge of it, except what they found in the recitals of the bond which they signed. For aught that appears, McCoy, or some other party to the delivery bond, may have presented to the defendants the bond sued on, and obtained their signatures under the belief that it truly recited the conditions of the delivery bond. It may, therefore, have been the intention of the defendant sureties to bind themselves only to the extent of McCoy's obligation under the delivery bond, which was that he should return the property in whatever condition it might be.

It seems to me that the proper remedy of the plaintiff, if he has any upon the facts disclosed, is by a bill in equity to reform the bond sued on, so as to conform it to the mutual intention of the parties. Even if there be a concurrent remedy at law, it is, at best, an imperfect remedy; and equity is by no means ousted of its jurisdiction to reform a written instrument by the fact that a concurrent remedy exists at

law. The remedy in equity, if the proper facts can be shown, is unquestionable and entirely adequate, while that which the plaintiff is now pursuing is, to say the least, dubious and imperfect.

Demurrer sustained.

Tuedt and others *v.* Carson and others.

(District of Minnesota. 1882.)

1. Removal of Cause.—The act of 1866, providing for the removal of a part of a cause into the federal court, and thereby splitting the action, was repealed by section 2 of the act of March 3, 1875.
2. Same—Under Act of March 3, 1875.—An action brought by a citizen of the state in which it is brought against citizens of the same state and citizens of another state, cannot be removed from the state court to the federal court by the non-resident defendants, unless the whole suit is removed.
3. Same—Severable and Inseverable Controversy.—Although an action brought by the plaintiff against several defendants is for a tort, in respect to which plaintiff could sue one or all of the tort-feasors, yet if he elects to sue all, it will be deemed so far an inseverable controversy that a part only of the defendants cannot remove the cause into the federal court.

Treat, *District Judge.*—This case was instituted in the state court against several non-resident defendants; also Wood and Styles, residents. The action is for malicious prosecution. The cause was removed from the state court to this court at the instance of the non-resident defendants. Without suggestion to the court that this was a removed cause, it went to trial on its merits. It appeared that the non-residents, being merchants, had sold and delivered to the plaintiffs goods amounting to three or four hundred dollars. Having heard a rumor that the plaintiffs had failed, a telegram was sent by them to Wood, of the law firm of Wood & Styles, inquiring as to the truth of said rumor. Wood

answered, substantially, that the plaintiffs had not yet failed, but were in a bad way, and requesting said non-resident defendants to send forward the amount of their demand and the individual names of the members of the firm. That was done, together with a direction to secure their demand at all hazards. After information secured by Wood & Styles as to the preparation of an attachment suit in the interest of others, Styles made the needed affidavit for an attachment, upon the strength of which a levy was made. It was contended that such action having been had without previous demand for the amount due, other attachment suits of like nature were induced, whereby the store of the plaintiffs, under the several attachment and other suits following, and executions issued, plaintiffs' property was sacrificed at said execution sales. Judgment was had in the state court, as by default, against the plaintiffs here for the amount of the demand made by the non-resident defendants in this suit, and execution was issued and levied accordingly; also several executions under other judgments.

The non-resident defendants in this suit gave no direction to their local attorneys as to the manner in which they should proceed, but before final judgment, were informed that an attachment suit had been instituted in their name. Of the facts averred in the affidavit made by Styles, they knew nothing. There was no evidence offered to show the connection of the non-residents with the commencement and continuance of said attachment suit other than what is thus stated. At the close of the case the counsel for said non-resident defendants asked the direction of the court as to their liability on the case as made. The court, holding that they were not responsible in this action for what their local attorneys had done without their knowledge or direction, ordered a verdict in favor of said non-resident defendants, and suggested to plaintiffs' counsel to proceed before the jury with their cause of action against said Wood & Styles. The plaintiffs' counsel thereupon moved to remand

the cause, which was overruled. A verdict for non-resident defendants was rendered, and the plaintiffs' counsel moved to remand the cause as to the resident defendants, which motion was also overruled. No further action was had, because said resident defendants had not appeared to contest the cause, and the plaintiffs declined to proceed further as to them. At that stage of the case it was suggested by said resident defendants that they were willing to have the case as to them submitted to the jury.

It should also be stated that after judgment had been rendered in the original attachment suit the same was opened on motion, and after said motion was heard the attachment was dismissed, but the judgment for the demand sued for upheld, leaving in force the levy on execution. There were many facts and circumstances developed which made it proper for the jury to decide whether said Wood & Styles acted with malice, and without probable cause.

It will thus be seen that the case is anomalous. In one of its aspects the court should, at the request of Wood & Styles, have submitted the case, as to them, unargued, to the jury, under such instruction as the case demanded, inasmuch as plaintiff's counsel declined to proceed further as to them, resting on his motion to remand. In another aspect, it may be urged that as the whole case was before the jury, and a verdict rendered in favor of the non-resident defendants on the submission of the case, and nothing was said in the verdict as to the other defendants, the verdict, under the circumstances stated, should be held as if for all the defendants. Behind the immediate conduct of the suit and the verdict rendered is the grave question whether this suit was removable to the United States court. The action was *ex delicto*,—a tort,—in respect to which the plaintiffs could sue one or all of the tort-feasors. They chose to sue all, resident and non-resident, in one suit. The non-resident defendants caused the whole suit to be removed, and now contend that as the cause of action was severable as against tort-feasors, the case

falls within the recent rulings of the United States supreme court. It has been conceded, and has been expressly decided, that the act of 1866 is repealed by the act of 1875, so that the whole case must be removed if a removal is had. It therefore becomes necessary to decide whether, under the act of 1875, this case was removable.

The question presented has been suggested to the United States supreme court in several cases, the most recent of which went to that court from this circuit.

In the case of *Barney* v. *Latham*, 103 U. S. 205, no new views were expressed, but an elaborate analysis given of the various acts of congress whereby the conclusion theretofore reached was upheld, viz., that when many parties are named, some of whom are formal, though essential to the record, United States courts are not ousted of their jurisdiction if, under another distribution of the parties to the record, the real controversy is between citizens of different states. That case is only one of many to the same point. The case of *Hyde* v. *Ruble* has since been before the United States supreme court, in which the opinion of this court in remanding said case was sustained. That was a suit by a Minnesota plaintiff on a contract of bailment against copartners, one of whom was a citizen of the same state with plaintiffs, and the other copartners (defendants) citizens of another state. The United States supreme court held that the case was not removable.

How does this suit differ from that in principle?

The act of 1866 in *terms* permitting the unseemly condition of having a suit in a state court split in two as to the respective parties, whereby precisely the same cause of action would be pursued at the same time as to some of the defendants in the state court, and as to others in the United States court, it is evident that the results of the distinct trials in different jurisdictions might differ; and consequently persons equally liable would be in the strange predicament of having no right of contribution, where

the cause, which was overruled. ... defendants was rendered, and ... to remand the cause as to ... motion was also overruled. ... cause said resident defen... the cause, and the plai... to them. At that sta... resident defendants ... ...g the in- as to them submit... ...arties might be

It should also ... suffice that in some dered in the ori... ...uting opinions were orig- on motion, an... ...as so construed as to permit was dismisse... ...nd as to the constitutionality of upheld, lea... ...ne legitimate construction of its terms. many fa... ...m such and other considerations congress proper f... repealed that statute. The mischief to be acted ... ...ust be regarded in construing any statute which

It ... prior laws or enactments. Hence, it is clear that its ... ...llowing language of the act of 1875 ought to receive h... ...y one interpretation. The act says in section 2 that any ... ...it of a civil nature, etc., may be removed from a state to ... United States circuit court (omitting other provisions). "When, in any suit mentioned in this section, there shall be a controversy which is *wholly* between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants *actually interested* in such controversy may remove said suit to the circuit court of the United States for the proper district."

The plain meaning of the provisions of the act of 1875, thus quoted, is that when all the plaintiffs are residents, for instance, in the state in whose local court suit is brought, and *all* the defendants are non-residents, then *all* the defendants may by uniting cause the suit to be *wholly* removed, or *any one* of the many non-residents may cause the removal of the *whole* case, although his co-defendants do not join in the request. Under such construction of the statute, the whole

...uld be transferred to the federal ...difficulty arise. While it is the ...of one state, other than that ... to have the controversy ... is equally the right of ... solely in the state ...of 1866 was passed. ...s,— such as already sug- ...ss repealed that act, so that ...ed splitting of cases. The whole ..., or no removal had. The act of 1875 ... All of the actual parties on the one side must be citizens of different states, in which ...e of the non-residents, even if the others on the ...e side do not join, may cause the whole controversy to be removed. The act of 1875, however, is guarded in its terms, so as to prevent injustice; for it, as it were, emphasizes the clause that either one or more of the plaintiffs or defendants (under the conditions stated) *actually interested* in such controversy *may* remove, etc. Under that provision the federal courts look to the position of the parties to ascertain whether they are *actually interested*, and if not, as in *Barney* v. *Latham*, the jurisdiction of the federal court is not ousted.

In the suit now under consideration an apt illustration occurs. Many persons were sued in the state court, some resident and some non-resident. The non-residents caused a removal. It is true, the plaintiff could have sued any one or more of the defendants, because the action was in its nature severable, yet he chose, as was his right, to pursue all the wrong-doers in one suit. In the progress of this suit it is judicially determined on the merits that no cause of action exists against the non-residents, leaving the case to be further pursued solely between resident plaintiffs and resident defendants. The case thus became split into two parts, to be continued in a forum which had no jurisdiction of the remaining parties if they had originally been the sole parties.

There could not be presented a more forcible illustration of the error in holding that the case was removable at all. It is unnecessary to trace the rulings under the act of 1789 and subsequent acts to the present time, to show that the conclusion reached is the only justifiable one.

The case was not removable, and should have been remanded on motion at the outset, without reserving that motion until the case had been tried on its merits. Still it is the duty of this court, when at any stage of the proceedings it ascertains that it has no rightful jurisdiction, to dismiss or remand.

The court is bound to correct its errors when made to appear. It therefore sets aside the verdict entered, overrules its own action on the motions for removal, and orders the whole case remanded to the state court whence it was removed, with costs against the removing parties.

NELSON, *District Judge*, did not sit in the case.

HIBERNIA INS. CO. *v.* ST. LOUIS & NEW ORLEANS TRANSP. CO.

(Eastern District of Missouri. September, 1882.)

1. CORPORATIONS — FRAUDULENT TRANSFER OF ASSETS. — Equity will not permit the stockholders in one corporation to organize another, and transfer all the corporate property of the former to the latter, without paying all the corporate debts.
2. SAME — ENFORCEMENT OF OBLIGATIONS. — Where such a transfer is made, the obligations of the old corporation may be enforced against the new to the extent of the assets received by it.

For report of opinion on the demurrer to the bill in this case, see 3 McCrary, 368.

O. B. Sansum and *George H. Shields*, for plaintiff.

Given Campbell and *Thomas J. Portis*, for defendant.

McCRARY, *Circuit Judge.*— This case has been considered upon the plea interposed by the defendant to the fifth subdivision of the bill, and the proofs adduced in support of the same. The bill alleges that the complainant is, by subrogation to the rights of certain shippers, a creditor of the Babbage Transportation Company, a corporation of Missouri, and that, after the creation of the indebtedness, said corporation transferred all its property to the St. Louis & New Orleans Transportation Company, another Missouri corporation, without making provision for the payment of complainant's claim. It is alleged that Henry Lourey, being the president of said Babbage Transportation Company, and the principal owner of the stock thereof, organized the said St. Louis & New Orleans Transportation Company, and caused all the property of the former to be sold and transferred to the latter, without paying or securing the debt due the complainant. It is averred that the said sale was made without the payment of any consideration by said St. Louis & New Orleans Transportation Company. Then follows the following allegations, to which the plea applies:

"*Fifth.* And your orators charge that said sale and transfer of the property of said Babbage Transportation Company to the said defendant, St. Louis & New Orleans Transportation Company, was fraudulent as against the rights of the complainants, creditors of the Babbage Transportation Company, and that the said Henry Lourey and the said St. Louis & New Orleans Transportation Company had notice of said fraud; and so your orators allege and charge that said St. Louis & New Orleans Transportation Company was not a *bona fide* purchaser of said property for a full and valuable consideration, without notice of the rights and claims of your orators in the premises, and that said sale and transfer of said property was made subject to the rights of all persons who had claims, debts or demands against said Babbage Transportation Company, and the claim and demand aforesaid of your orator.

"Wherefore your orators pray process against the said St. Louis & New Orleans Transportation Company, the said Babbage Transportation Company, and the said Henry Lourey, and that they be cited to appear before this honorable court, and true answer make to all and singular the matter aforesaid, their answer under oath being hereby expressly waived, and that this honorable court will be pleased to decree payment of the aforesaid debt to your orators with interest thereon and costs of suit, and that said St. Louis & New Orleans Transportation Company be restrained from selling or otherwise disposing of any of the said property until your orators' said debt, and interest and cost, be paid and satisfied, and that until the said debt be satisfied your orators have a lien upon said property in said Exhibit A described, and that this honorable court will be pleased to give and decree to your orators such other and further relief as to law and justice and as this honorable court shall be able to give in the premises."

The plea avers that the Babbage Transportation Company, being the owner of its property, for a valuable consideration, and with the consent of all its stockholders, sold and delivered the same to the St. Louis & New Orleans Transportation Company; that the consideration paid consisted of five hundred shares of the capital stock of the last-named company, of the value of $100 a share, and the agreement of said last-named company to pay all the then known outstanding debts of the former company, not to exceed $42,000; that the sale was *bona fide*, and that neither of the parties thereto were aware that the old company was in any manner liable to or indebted to the complainant, or the parties under whom it claims by subrogation; that the stock was delivered to the old company, and the new company paid all the debts of which the parties had notice at the time of the sale. All fraud is denied. The proof shows the following facts:

(1) The Babbage Transportation Company sold all its property to the St. Louis & New Orleans Transportation

Company in consideration of five hundred shares of full-paid stock in the latter company, and the payment of the debts of the former company to an amount not exceeding $42,000. (2) This consideration was paid by the delivery of the stock and the payment of the debts, amounting to something more than $42,000, but not including the claim of complainant. (3) All the stockholders in the old company assented to the sale on these terms. (4) Henry Lourey was a large stockholder in the Babbage Transportation Company, and was also president, general manager and treasurer thereof. (5) The said Henry Lourey was also then an officer of the St. Louis & New Orleans Transportation Company, and the stockholders of the two companies were substantially identical. (6) The officers and stockholders in both corporations at the time of the sale knew of the accident and loss out of which the complainant's claim arose, but no demand had been made for the payment of the sum, and they did not know that any would be made. (7) At the time of the sale inquiry was made as to the amount of outstanding indebtedness of the Babbage Company, and the same was estimated at about $42,000.

Upon these facts this court holds that the sale by the Babbage Company of all its property to another corporation, composed mostly, if not wholly, of the same persons, was fraudulent and void as to all creditors of the former company not assenting thereto. The purchaser knew that it was buying all the property of the seller, and that by the transaction the latter was being deprived of the means and power of meeting any of its outstanding obligations. The fair inference from the transaction is that the old company was about to be dissolved and to cease to be. It was to be absorbed by the new company. This is the inevitable consequence of the formation of the new company, composed substantially of the same persons, to transact the same business at the same places, and with the same property. By the transfer the creditors of the old company were deprived

of the means of enforcing their claims. Probably no officers of the old company have since been elected, and it is to be presumed that none will be. This being so, it is at least doubtful whether service of process could be obtained so as to procure a judgment at law against the old company. And if a judgment were obtained, it could not be collected out of any assets in the possession of the old company, because it has turned all its assets over to the new company. It has received, it is true, paid-up stock in the new company, but that has doubtless been disposed of; or, if it has not been, it may at any moment be transferred. Equity will not compel the creditor of a corporation to waive his right to enforce his claim against the visible and tangible property of the corporation, and to run the chances of following and recovering the value of shares of stock after they are placed upon the market. A distinction with respect to transactions of this character exists between a corporation and a natural person. A natural person may sell all his property for a fair consideration, if the transaction is *bona fide*, and the buyer will not be required to take care that the seller provides for and pays all his debts. A corporation, unlike a natural person, by disposing of all its property, may not only deprive itself of the means of paying its debts, but may deprive itself of existence and place itself beyond the reach of process at law. At all events, equity cannot permit the owners of one corporation to organize another, and transfer from the former to the latter all the corporate property, without paying all the corporate debts; and that is the exact case now before us.

Here was a corporation engaged in a profitable business, and owning and possessing property valued at $92,000, exclusive of its franchise. It owed debts confessedly amounting to less than the value of its property. It ceases to transact business. Its stockholders organized themselves into another corporation, and all the property is transferred from the old to the new. It matters not that the stock-

holders in the two companies may not be precisely identical. We are not prepared to say that it would make any difference if the members of the new company were none of them interested in the old. The thing which we pronounce unconscionable is an arrangement by which, one corporation takes from another all its property, deprives it of the means of paying its debts, enables it to dissolve its corporate existence and place itself practically beyond the reach of creditors, and this without assuming its liabilities. The fact here, however, appears to be that the owners of the two corporations are substantially identical, and hence there is a still stronger case in equity. It may be that in such a case the purchasing company might be permitted to show, by way of defense, that it has paid debts against the old corporation to an amount equal to the whole value of the property received from it, including the value of its franchise. But this is a doubtful question, which does not arise here, and we express no opinion upon it.

TREAT, *District Judge, concurring.*— My views in this case were fully expressed in the opinion on the demurrer to the bill. In the light of the decision by the United States supreme court then referred to, the plaintiff can pursue its demand against a new corporation which is, though nominally a different corporation, actually the same under a different name, having obtained all the assets of the old.

The facility with which new corporations are formed under local statutes to succeed to rights of property by transfer from the old corporations is to be considered, and such transfers are not to be held in equity destructive of prior and existing rights. A corporation with obligations determined or undetermined cannot change its name or assume the form of a new corporation, and thus escape its obligations, or relieve the new corporation of the obligations of the old; at least to the extent of such obligations and assets.

It is said that the new corporation acquiring the property

of the old for adequate consideration should not be answerable for the debts of the old; that it could buy the property, no lien thereon existing, free from all demands at large; and consequently the new corporation, like any other purchaser, is not responsible, personally or otherwise, for the debts of the vendor. That proposition need not be disputed. But what is the case before the court? The Babbage Company had possibly incurred a liability for its violations of contracts. The original parties had not asserted their demand. The questions were whether the Babbage Company was liable for violations of contracts of affreightment. The plaintiff paid the losses and became subrogated to the rights of the shippers. In the meantime the Babbage Company ceased practically to exist, and transferred all its property to the St. Louis & New Orleans Transportation Company, whereby it had technically no property to respond to plaintiff's demand. Can the transferee, under the circumstances, be held to answer the demand?

The plea avers substantially that the new corporation purchased, for valuable consideration, the property of the old corporation, paying therefor $50,000 in stock of the new, and assuming the obligations of the old to the extent of $42,000; that said obligations have been met, and additional obligations, which Capt. Lourey has paid, to the extent of about $13,000.

It is the duty of the court to examine the whole transaction, and to cut through mere paper transfers designed to obstruct or destroy the rights of parties. The evidence sufficiently discloses that the new corporation was a mere continuance of the old, with substantially the same parties in interest — a mere change of name. Whether that change, with attendant transfers, was designed or not to defeat all outstanding demands of the old corporation, it is evident that substantially the two corporations are the same, and that the new must respond to the obligations of the old. The evidence is clear enough that there was a hidden pur-

pose in the change of corporative existences to escape possible liabilities which equity does not tolerate. A mere change of name cannot avoid obligations. The new corporation took all the property of the old; went forward with its business; had the same stockholders, except a few formal ones; was, in short, the old corporation, and now seeks to escape the obligations of the old, rescuing the property of the latter from the demands the former was bound to meet. Can this be done? The old corporation and its property were liable to the demands of the plaintiff. The new corporation must respond to the extent of the property acquired, and possibly to the full extent; that is, if property sufficient therefor is in its possession. This is a proceeding in equity, wherein mere colorable pretenses are to be disregarded. Shiftings of corporate names cannot defeat positive rights any more than the change of the name of a natural person can absolve him from his personal obligations.

The evidence discloses that the obligations of the Babbage Company still subsist against its corporate successor; at least to the extent of assets acquired.

If these views are not sound, a corporation with demands pending can transfer all its assets to a new corporation, and thus leave the demands inoperative, although said new corporation is the old except in change of name. The evidence shows that since this cause was instituted a new consolidation has occurred, whereby another transfer of property has been had. Is it to be considered in equity that such transfers and practical dissolutions of corporations will prove effectual to defeat existing and valid demands? Or will the corporate successors be held to the obligations of their predecessors; at least to the extent of the assets acquired? It may be that between the old and new, in connection with lien or general demands, an accounting may be had, so that unpaid creditors may know what remains. If the new company has paid the full value of the property acquired, then it possibly may not be answerable; but if it has merely

issued to the old its stock therefor, why should it not, at least to the extent of that stock, which represents values for property acquired, meet the obligations to which such stock should fairly be held subject?

Property to the amount of $92,000 was transferred, and $42,000 indebtedness was actually paid. Hence property of the old corporation is in possession of the new to the extent of $50,000, which ought to be subject to the obligations of the old company. The fact that the new corporation has issued its stock to the old for said $50,000 cannot defeat the rights of parties.

Fletcher *v.* New York Life Ins. Co.

(Eastern District of Missouri. September, 1882.)

1. Insurance — Corporations — Comity. — A foreign insurance company cannot withdraw itself from the operation of the statutes of a state in which it does business, by the insertion of clauses in its policies.
2. Same — Application for Insurance — Fraud. — Where, by the terms of a policy of insurance sued on, an application signed by the assured is declared to be the sole basis thereof, evidence is admissible to show that false statements contained in the application were inserted without the applicant's knowledge by an agent of defendant, and that the applicant's signature was procured by such agent by fraud.
3. Pleading — Replication — Surplusage. — Where sufficient probative facts appear, a reply is not demurrable because it also contains allegations as to mere matters of evidence.
4. Corporations — Agent — Acts, When Binding. — Corporations are held to whatever is within the apparent scope of their agents' powers, unless parties with whom such agents contract have notice that their powers are limited.
5. Insurance — Application — Fraud. — Where a party desiring insurance upon his life signed an application which contained an agreement that the statements and representations therein should be the basis of the contract, and warranted their fullness; and which also contained an agreement that no statements, representations or information made or given by or to the person soliciting or taking his ap-

plication for a policy, or to any other person, should be binding on the company, or in any manner affect its rights, unless such statements, representations or information were reduced to writing and presented to the officers of the company at its home office; and where such application contained two false answers material to the risk, which had been written therein by the agent of the company who examined the applicant and took his application; *held*, that no suit could be maintained on the policy in case of the assured's death unless it were proved that the assured's answers to the questions to which false answers had been inserted were true, that the false answers had been inserted by the company's agent without the assured's knowledge, and that such agent concealed from the assured what he had written in the application, and induced him to sign it without knowing what it contained.

6. SAME.— Parol evidence is admissible in such cases to show fraud on the agent's part.
7. SAME — CONCEALMENT OF AGENT'S FRAUD.— Where an applicant for insurance discovers before the policy is issued, or the first premium paid, that the company's agent has obtained his signature to an application containing false answers, it is his duty to go no further in the transaction; but if he does not make the discovery until after the policy has been issued and the first premium paid, he is not bound to take any steps to have the policy canceled.

Demurrer to replication.

This is a suit upon a policy of insurance upon the life of C. S. Alford, deceased, by his executor, Thomas C. Fletcher. Defendant alleges in its answer that it is a foreign corporation; that said Alford made a written application to it for insurance upon his life, and that the application was signed by him, and was attached to and made a part of said policy when issued; that said application contained two false answers to questions material as to the risk, therein printed, and the following clause, viz.:

"And I do hereby agree that the statements and representations contained in the foregoing application and declaration shall be the basis of the contract between me and the said company,— the truthfulness of which statements and representations I do hereby warrant; and that if the same, or any of them, are in any respect untrue, the policy which may be

issued thereon shall be void, and all money which may have been paid on account of such insurance shall be forfeited to said company; and inasmuch as only the officers at the home office of the company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, it is expressly understood and agreed that no statements, representations or information made or given by or to the person soliciting or taking this application for a policy, or to any other person, shall be binding on this company, or in any manner affect its rights, unless such statements, representations or information be reduced to writing and presented to the officers of the company, at the home office, in the above application."

Plaintiff's reply consists, to a considerable extent, of evidentiary matter. The allegations, so far as it is deemed necessary to set them forth here, are substantially as follows, viz.: That the defendant, though a foreign corporation, was, at the time said policy was issued, authorized and licensed under the laws of Missouri to transact business in that state; that said application was taken and said policy delivered to said Alford in the city of St. Louis; that the application was taken by certain agents of defendant; that one of them read the questions therein contained, and pretended to write the applicant's answers thereto in the application; that the false answers contained in the application were not made by the applicant, but that he answered the questions to which said false answers were appended truly, and that he did not read said answers over, or have them read to him, but signed said application under the impression that his answers had been reduced to writing substantially as made. And in the second part of his reply plaintiff states that, after the said application had been signed, defendant's agent took it, but that said Alford neither sent it to any officer of defendant at New York, or authorized any one else to do so; that the policy was shortly afterwards delivered to said Alford, and

the premiums collected, and that he, supposing the answers in the application were taken as given, or were written to the satisfaction of defendant, did not read over the copy attached to the policy, or the policy, but was told by said agent on delivering it that it was all right, and that he was insured; that said Alford paid the annual premiums as they fell due, and that they were collected by said agent of defendant, with full knowledge of the aforesaid facts.

To the first part of said reply defendant demurred on the following grounds:

First, that the matters therein set forth as pleaded do not constitute a cause of action against this defendant, nor constitute in law any reply to the new matter set forth in defendant's answer; *second*, that any issuable facts in said portion of said reply contained are intermixed with statements of evidence and matters wholly irrelevant.

To the second part of said reply defendant demurred on the grounds:

First, that the matters therein set forth do not in law constitute any cause of action in plaintiff, nor any defense to the matters set forth and pleaded in the defendant's answer; *second*, that said part of said reply contained statements of evidence and matters wholly irrelevant.

Section 5977 of the Revised Statutes of Missouri is as follows:

"In suits brought upon life policies heretofore or hereafter issued, no defense based upon misrepresentation in obtaining of securing the same shall be valid, unless the defendant shall, at or before the trial, deposit in court, for the benefit of the plaintiffs, the premiums received on such policies."

For report of charge to jury at first trial, see 3 McCrary, 603. For report of decision upon motion for a new trial, see id. 607.

Carr & Reynolds, for plaintiff.

Overall, Judson & Tutt, for defendant.

TREAT, *District Judge.*— There are substantially only two questions involved: *First.* Inasmuch as the policy sued on declared that it rests on the basis of answers made to the application, and that said policy was to be issued at the home office in New York on return thereto of the application, can the plaintiff avail himself of the force of the Missouri statute? The defendant company was doing business in Missouri, with the privileges granted to it here, when said insurance was effected. It may be that the formal acceptance of the proposed contract was, by the *letter* of the contract, to be consummated in New York. The broad proposition, however, remains, no artifice to avoid which can be upheld. The statutes of Missouri, for salutary reasons, permit foreign corporations to do business in the state on prescribed conditions. If, despite such conditions, they can by the insertion of clauses in their policy withdraw themselves from the limitations of the Missouri statutes, while obtaining all the advantages of its license, then a foreign corporation can by special contract upset the statutes of the state and become exempt from the positive requirements of law. Such a proposition is not to be countenanced. The defendant corporation chose to embark in business within this state under the terms and conditions named in the statute. It could not by paper contrivances, however specious, withdraw itself from the operation of the laws, by the force of which it could alone do business within the state. To hold otherwise would be subversive of the right of a state to decide on what terms, by comity, a foreign corporation should be admitted to do business or be recognized therefor within the state jurisdiction. Each state can decide for itself whether a foreign corporation shall be recognized by it, and on what terms. Primarily, a corporation has no existence beyond the territorial limits of the state creating it, and when it undertakes business beyond it does so only by comity. The defendant corporation having been permitted to do business in Missouri under the statutes of the latter, was

bound by all the provisions of those statutes, and could not, by the insertion of any of the many clauses in its forms of application, etc., withdraw itself from the obligatory force of the statute. The contract of insurance, therefore, is a Missouri contract, and subject to the local law.

There are other questions involved in the demurrer which are of no small importance. It is averred that the answers to questions in the application were not only false, but as to matters which were so far essential to the risk as to fall within the terms of the statute; in other words, that the insured died of the very disease which he denied or concealed. If that be so, there can be no recovery. On the other hand, it is alleged that he made the fullest and most honest disclosures with respect thereto, and referred the soliciting agent to his physician for a fuller statement; that the soliciting agent, in his anxiety to secure the policy, and being acquainted with the applicant, wrote down as answers to the questions objected to, not what the applicant answered, but what he, the agent, chose to fill out so as not to lose the risk. This involves the proposition whether, when under the terms of the policy the application is declared to be the sole basis thereof, any evidence will be heard to avoid its effect against the party's own signature.

This question is not a new one. Of course, a fraud will bind no one. Why, then, should a signature to an application of this kind, procured by fraud, be obligatory? It is not a question of estoppel, for an insurance company may have continued to receive premiums in ignorance of the false statement by the applicant, and, therefore, should not be held to a fraudulent contract, of whose fraudulent character it knew nothing.

The real question presented is whether the averments in the reply are sufficient to overcome the defense set up. We hold that, if the statements of the reply are true, then the defense is overcome. If the disease mentioned was fatal, the plaintiff, even under the Missouri statute, is driven to

show that the answers to the application which he signed were, despite his signature, never made by him; in other words, that a fraud was perpetrated on him by the company's agent.

Analyzing the pleadings, there is room for comment as to the form thereof. The doctrine is clear that only probative or ultimate facts can be pleaded, and not mere matters of evidence. The reason is obvious. What issue shall be taken? Not on details of evidence tending to show a fact, but solely as to the existence of the probative fact itself.

With due regard to the rules of pleading, it appears that, despite surplusage, the replications must be held good, in the light of the legal rules stated, inasmuch as there can be no pleadings subsequent to the reply.

Demurrer overruled.

McCRARY, *Circuit Judge*, concurs.

Afterward the following charge was given to the jury:

McCRARY, *Circuit Judge (orally).*— The principal facts in this case are not disputed. The matters for your consideration will fall within a very narrow compass. It is therefore not necessary that the court should charge you at any great length.

It is admitted that this policy of insurance was executed by the defendant company; that it was a policy upon the life of Chinonda S. Alford; that Mr. Alford died, having paid his premiums up to the time of his death; that the plaintiff here is his executor, and is entitled to recover, if a case has been made out upon the contract. The defense is that the applicant for insurance, Mr. Alford, at the time of making his application, made certain statements in writing, in the application, which were untrue and which were material.

It is said that he represented to the agent of the com-

pany that he never had any disease of the kidneys; that he represented that he never had an attending physician; that in these respects his application was untrue; and, these being material matters, it is claimed that the contract based upon them is void. In answer to this, it is said that, although there is a writing containing these representations, and although it is signed by the assured, Mr. Alford, yet that writing was obtained from him by fraud on the part of the agent of the insurance company. The law is that an insurance company, like any other person, natural or artificial, may appoint an agent, and may put limitations upon the powers of the agent, provided knowledge or notice of these limitations be brought home to the party with whom the agent contracts; otherwise the principal — in this case the insurance company — is held to whatever is the apparent scope of the agent's authority. This doctrine is invoked here, and is applicable to a certain extent, and only to a certain extent. There is a limitation in this contract upon the power of the insurance agent. The company is not to be bound by any representations made to or by the agent, unless these representations are put in writing and submitted to the company. Therefore, what is contained in this application, although the answers were not truly recorded, would be regarded as constituting the basis of this contract, unless it can be avoided for fraud. Consequently the question for you to determine is whether there was a fraud in the procuring of this policy of insurance by the agent of the insurance company; and upon that subject I will state what I understand to be the correct rule. If the jury find from the evidence that at the time of making the application Mr. Alford told the agent of the defendant that he, Alford, had had *diabetes*, and referred him to his physician concerning it, and that such agent committed a fraud upon Mr. Alford by inserting false answers in the application and suppressing the answers actually given, and by concealing from him what he, the agent, had written in the application, thereby induc-

ing him to sign said application without knowing what it contained, then the plaintiff is not estopped to recover.

You will see, gentlemen, that there are two things to be shown: *First*, that the assured, Mr. Alford, made true representations with regard to this matter of his having had a disease, and his having had an attending physician; *secondly*, it must appear that the agent of the company, for the purpose of inducing him to insure, for the purpose of obtaining from him the premium which he was to pay, falsely inserted in the application answers which he did not give; and then it must also be shown that Mr. Alford signed the application in ignorance of the fact that his answers had not been truly recorded in it.

If all these appear, then there is a case of fraud established. The burden of proving fraud is upon the plaintiff. The presumption is that the paper which was signed by Alford contained his true answers, and that presumption must be overcome by proof offered here by the plaintiff. I think that is really the only question that there is for your consideration — the question of fraud.

There is another point made by counsel which deserves notice. If the plaintiff ascertained before the contract was consummated that this fraud had been practiced upon him by the agent, it was his duty then to stop and to go no farther; that is, if at any time before the policy was delivered to him, and the first premium was paid, he discovered that the agent had committed a fraud upon him and upon the company (because it was a fraud both upon the assured and the company), then it was his duty to stop, and to decline to go any further with the transaction. But I think if he did not discover the fraud before the policy was delivered and the first premium paid, that he was not called upon after that to take any steps for the cancellation of the contract. The defendant has tendered here in open court the sum of $888.26. You will, in any event, return a verdict for that amount. The court will make such order with regard to costs as may

be considered right, after you have returned your verdict, if you give no more than that.

The question for you to determine is whether the whole amount of this policy is due, or whether your verdict is to be only for the amount tendered, which is $888.26. If you find for the plaintiff in the whole amount, you will give him interest at the rate of six per cent. per annum from sixty days after the date when the proof was filed, and that date is the fourteenth of December, 1880, so that interest would begin to run from the fourteenth of February, 1881. You will have to bear in mind these dates.

Your verdict, therefore, will either be for the sum of $888.26, or for the amount of the policy, with interest from February 14, 1881.

The jury rendered a verdict for plaintiff for the amount of the policy, with interest, and the defendant thereupon took an appeal to the supreme court.

In re ELLERBE.

(Eastern District of Missouri. October, 1882.)

1. CRIMES — CONTEMPT — REV. ST. §§ 725, 1014. — A refusal to obey a subpœna issued by a federal court is an offense against the federal government, within the meaning of section 1014 of the Revised Statutes of the United States.
2. SAME. — Where a federal court orders the arrest of a witness charged with having failed to obey a subpœna issued by it, and duly served, and the witness departs into another district before he can be arrested, any judge of the United States, having jurisdiction in the district to which the witness has removed, may order his arrest and removal back to the district in which he is charged with the offense.
3. SAME — RIGHT OF WITNESS TO A HEARING. — In such cases the judge ordering the arrest of the witness cannot inquire into his guilt or innocence before ordering his removal.

Petition for a writ of *habeas corpus*.

McCRARY, *Circuit Judge.*—The record of this case shows that the petitioner was arrested in this district upon a warrant issued from the office of the clerk of the circuit court of the United States for the eastern district of Arkansas, which warrant was issued by the order of that court in a proceeding against petitioner for contempt. It appears that petitioner was duly subpœnaed in said eastern district of Arkansas on the twenty-sixth day of April, 1882, to appear and testify on the twenty-seventh day of said month as a witness in a civil cause pending in said court.

When duly served with the subpœna he was temporarily within said district on professional business, but was a resident of St. Louis, within the eastern district of Missouri, more than one hundred miles from Little Rock, Arkansas, where the said cause stood for trial. His arrest was ordered by that court for contempt in neglecting to attend the aforesaid court as a witness, after having been duly served with process of subpœna. The warrant for petitioner's arrest was presented to the judge of the district court of this district, who indorsed thereon his order to the marshal of this district to arrest the petitioner and deliver him to the marshal of the United States for the eastern district of Arkansas. This arrest having been made, petitioner applied to the district court for discharge upon *habeas corpus*, upon the ground that the proceedings within this district were without warrant of law, and that petitioner was unlawfully restrained of his liberty, without justification and proper authority.

Section 725 of the Revised Statutes of the United States provides that:

"The courts of the United States shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment, at the discretion of the court, contempts of their authority; provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any persons in their presence, or so near thereto as to obstruct the administration of jus-

tice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the said courts."

Section 1014 of the Revised Statutes of the United States provides that "for any crime or offense against the United States" the offender may, by any judge of the United States, be arrested and imprisoned, or bailed "for trial before such court of the United States as by law has cognizance of the offense." And it further provides that "when any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the district judge of the district where such offender or witness is imprisoned, seasonably to issue, and the marshal to execute, a warrant for his removal to the district where the trial is to be had."

It is conceded by the counsel for the petitioner that the statute authorizes the arrest in one district of a party charged with the commission of an offense against the United States in another district. But it is contended that contempt is not such an offense. This position, however, is untenable. A refusal to obey the process of a court of the United States is an attempt to obstruct the administration of justice, and is plainly an offense against the federal government.

A proceeding in contempt, in a federal court, is a criminal case, to be prosecuted in the name of the United States. *Riggs* v. *Supervisors*, 1 Woolw. 377; *Ex parte Kearney*, 7 Wheat. 38; *New Orleans* v. *Steamship Co.* 20 Wall. 387.

By the express terms of section 725 of the Revised Statutes of the United States, the courts of the United States are authorized to punish contempt, and this necessarily implies that it is an offense against the United States. It has frequently been held to be an offense against the United States, within the terms of the provision of the constitution which authorizes the president to pardon such offenders. *Dixon's*

Case, 3 Op. Atty. Gen. 622; *Conger's Case*, 4 Op. Atty. Gen. 317; *Rowan & Wells' Case*, id. 458.

It is next insisted on behalf of the petitioner that he is entitled to a hearing before he can be sent out of the district, and that he has not had such a hearing as the law requires. It was, no doubt, the duty of the marshal of the eastern district of Arkansas to apply to the judge of this district for an order for the arrest of the petitioner; and it was the duty of the district judge to enter into such an investigation as was necessary to enable him to determine whether the petitioner should be sent out of the district to answer the charge against him. Precisely how far the district judge was authorized to go upon such a hearing, it is not necessary in the present case to determine. Certain it is that he had a right to inquire into the question of the prisoner's identity. This would be necessary in any case; for the judgment of a court in another district, however conclusive upon all other questions, would establish nothing with regard to the identity of the prisoner.

It may, for the purposes of this case, be assumed that the district judge could inquire into the question of the jurisdiction of the court in Arkansas to try the prisoner for the offense charged. If such be the law, the jurisdiction clearly appears. I do not think, however, that in a case such as this the district judge can go further and inquire into the question of the guilt or innocence of the prisoner. There may be cases in which the inquiry might properly extend to an examination into the question of probable guilt; but if so, they are cases where there has neither been a preliminary examination nor an indictment in the district where the offense was committed, nor an order for the arrest of the prisoner by a court of the United States of competent jurisdiction, and sitting in that district. See opinions of Mr. Justice Miller and Judge Love, 1 Woolw. 422.

The power to punish for contempt is inherent in every court, and, as we have already seen, is expressly conferred

upon the federal courts by act of congress. The record before us shows that the circuit court of the United States in and for the eastern district of Arkansas, having jurisdiction of the petitioner, ordered his arrest to answer for a contempt of its authority. That court is the sole judge of such a question, and it would be exceedingly improper for another court to assume to revise its judgment upon the subject. Even the supreme court of the United States upon appeal will not review the action of a circuit court of the United States in imposing a fine for contempt. *New Orleans* v. *Steamship Co. supra.*

If the district court had, in the present case, gone so far as to question the propriety of the order for the petitioner's arrest, on the ground that he was not guilty of a contempt of the authority of the circuit court of the United States for the eastern district of Arkansas, its action would have been unwarranted in law and disrespectful to another court of co-ordinate jurisdiction. The proof, therefore, which was before the district court sufficiently established all the facts that were necessary to justify the decision of that court against the petitioner. It showed that the petitioner was within the jurisdiction of the circuit court of the United States in and for the eastern district of Arkansas, that he was served with subpœna to appear before the court as a witness in a civil cause therein pending, and that he failed to respond to the subpœna, and removed himself beyond the jurisdiction of the court.

If persons summoned to appear as witnesses in the federal courts can refuse to obey the summons and place themselves beyond the reach of the law by departing from the district, the most serious consequences would result; the administration of justice would be greatly impeded, the rights of parties in many cases would be sacrificed, and the courts of the United States would be rendered powerless to protect litigants by compelling the attendance of important witnesses.

The conclusion is that the judgment of the district court should be affirmed. And it is accordingly so ordered.

Chester H. Krum, for petitioner.

M. Drummond, Assistant United States Attorney, for the United States.

NOTE.[1]—See *In re Tift*, 11 Fed. Rep. 463; *New York & Balt. C. P. Co.* v. *New York C. P. Co.* 11 Fed. Rep. 813; *U. S.* v. *Justices of Lauderdale Co.* 10 Fed. Rep. and note, p. 468; *In re Cary*, 10 Fed. Rep. 622, and note, p. 629; *Atlantic Giant Powd. Co.* v. *Dittmar Powd. Manuf'g Co.* 9 Fed Rep. 316; *Fischer* v. *Hayes*, 6 Fed. Rep. 63; *U. S.* v. *Memphis & Little Rock Co.* 6 Fed. Rep. 237; *Steam Stone Cutter Co.* v. *Windsor Manuf'g Co.* 8 Fed. Rep. 298; *In re May*, 1 Fed. Rep. 737; *Bridges* v. *Sheldon*, 18 Blatchf. 507; *Van Zandt* v. *Argentine Min. Co.* 2 McCrary, 642; *Ex parte Rowland*, 104 U. S. 604; *Hayes* v. *Fischer*, 102 U. S. 121; *U. S.* v. *Jacobi*, 1 Flippen, 108; *Hovey* v. *McDonald*, 8 McArthur, 184.—[ED.

HARRIS *v.* UNION PACIFIC R. Co.

(District of Colorado. June, 1882.)

1. NEGLIGENCE DEFINED.—Negligence is the want of that care and prudence which a man of ordinary intelligence would exercise under *all* the circumstances of the case.
2. SAME — BURDEN OF PROOF — PROXIMATE CAUSE.— Negligence is a question of fact to be found by the jury, and in order to recover, the plaintiff must establish by a fair preponderance of proof that the defendant was guilty of negligence, and that the injury complained of was the natural and ordinary result of such negligence, and that the negligence was the proximate cause of the injury which a reasonably prudent and cautious person ought to have apprehended might result from the act which he did.
3. SAME — RAILROAD COMPANY TO KEEP TRACKS CLEAR.— While a railroad company is bound to use great care in order to keep its tracks clear for the safety of its passengers, and for its employees, it is not responsible for the unlawful act of some third party in placing obstructions upon the track without its knowledge or consent, unless it be in the case where it had by its conduct done some act

[1] From *Federal Reporter*.

which it might reasonably have anticipated would lead to the placing of the obstruction upon the track.

4. SAME — MEASURE OF DAMAGES. — In determining the amount of damages, the jury should consider the pain and suffering to which plaintiff has been subjected, both mental and physical, the loss of time and loss of wages which has resulted from his injury, the nature and extent of his physical injuries, their effect upon his ability to earn his living since the accident as compared with his ability to do so before, and the probable effect of those injuries upon his future health and strength. Under all these circumstances, and in view of all these facts, they should estimate the damages, and give him such sum as they think will be a reasonable, not an unreasonable, compensation.

McCRARY, *Circuit Judge (charging jury).* — It is your province and duty to determine the facts of this case in the light of the evidence which you have heard, and of the law, which the court will now state to you. The plaintiff sues the defendant to recover damages upon the ground that he has been injured in his person by reason of the negligence of the defendant, the Union Pacific Railway Company.

You will observe, therefore, gentlemen, that the question which lies at the foundation of this suit, and which you must decide as a question of fact, is a question of negligence. If the plaintiff has failed to establish, by a fair preponderance of the proof, that his injury was the result of the negligence of the defendant, he cannot recover; but if he has established that fact by a preponderance of evidence, he may recover.

Negligence is the want of that care and prudence which a man of ordinary intelligence would exercise under all the circumstances of the given case. You may consider the question of negligence in this light: Whether a man of ordinary care and prudence would have done the acts which are shown by the evidence to have been done by the defendant railway company, and of which this plaintiff complains. You must be satisfied that the defendant company was negligent, and also that the plaintiff's injury was the result of

that negligence, or, as the law puts it, that the negligence was the proximate cause of the injury. It may be well to explain to you what is meant by the term "proximate cause;" and I think, perhaps, as good a definition as I can give you is this: that the injury must have been the natural and ordinary result of the cause; or, in other words, the question here may be stated to be whether a reasonably prudent and cautious person ought to have apprehended that the injury might result from the act which was done. Now, in this case, the proof shows, and about that there is no dispute, that a "push car" was left near the track by one of the employees of the defendant, and that it was not locked or secured in any way to prevent its being placed upon the track. It was, however, placed upon the track, and by whom we are not advised. It is not to be presumed that it was done with the knowledge or consent of the defendant. If that were so, it would be incumbent upon the plaintiff to establish it by proof. So that we may take it to be established that it was placed upon the track by some third person, by some outside party, and the question for you to determine is, whether the leaving that push car in that position was an act of negligence. In order to determine that question you must consider all the facts and circumstances of the case, and, in the light of such knowledge as you have, which is common knowledge to everybody, you will decide whether the railroad company was bound to anticipate that the push car might be placed upon the track, and that injury might therefore result to some person passing on a train. If it had been some other article beside a push car, there might be no question about it; as, for example, if it had been a common road wagon which had been left by the side of the track, or if a pile of lumber had been left there, or a lot of railroad ties, we would all understand at once that the railroad company could not expect and could not be required to anticipate that somebody would come along and place one of these things upon the track. The question is, whether a different rule applies

where the article is a "push car." While the company is bound to use great care in order to keep its track clear for the safety of its passengers and for the safety of its employees, it is not responsible for the unlawful act of some third party in placing obstructions upon the track without its knowledge or consent, unless it be in a case where it had by its conduct done some act which it might reasonably have anticipated would lead to the placing of the obstruction upon the track.

It is insisted by counsel for the plaintiff here that there is a well-known disposition among men to place such an article as a push car upon the track when they find it by the side of the track. There is no such disposition with regard to the other articles of which I have spoken; but with regard to an article of this character it is for you to say whether there is such a well-known disposition among men as is claimed by the counsel for the plaintiff. If that be a fact so well known that it is a matter of general understanding and general knowledge, then the defendant was bound to take notice of it and to act upon it. And so you will come to the question whether, when the push car was left in that position, the railroad company was bound to know, bound to anticipate, that it might be placed upon the track, and thereby that some one might be injured.

The rule with regard to the negligence of fellow servants, to which some reference has been made, I think has little, if anything, to do with the case. There is, I suppose, very little question that the company here either had no rule requiring a push car to be locked, or that, if they had such a rule, that it was not observed; in other words, there was no rule or practice of the company that required the foreman of this division to lock his car. He left it by the side of the track, as I apprehend you will have no difficulty in determining, upon the evidence, in accordance with the usual custom in such cases upon that road. Now, if there was negligence at all, under such circumstances as that, it was

the negligence of the company in not having some rule requiring the locking of cars when left by the side of the track, and that is the question for you to determine. It is true, as counsel for the defendant has stated in discussing this question of proximate cause, that if there is any intermediate independent cause to which the injury can be attributed, then the company is not liable. But that is but another way of stating the rule that I have already stated, because, if the company was bound to anticipate that there was danger that this car would be placed upon the track, then the placing of the car upon the track by some intermediate agency was not an independent cause, but was only one of the causes included in the chain of causes which resulted in the injury. So that we must come back in the end to the question which I have already stated to you, whether the leaving of that car in that place was of itself an act of negligence; and it was not an act of negligence unless the company was bound to apprehend that it might be placed upon the track, and might cause an injury. In determining this question you are to consider all the facts and circumstances as they are developed before you in testimony. You may consider the weight and construction of the car, its distance from the track, the statute of this state against placing obstructions upon the track, under heavy penalties, the custom with regard to manner of taking care of such cars when not in use, and the fact, if it is established, that from Golden to Denver is down grade, as well as all other facts and circumstances developed in evidence before you. And if, upon a consideration of all the evidence, you conclude that the defendant was guilty of negligence in leaving the push car by the side of the track, and that that negligence resulted as the proximate cause in the injury of the plaintiff, then he is entitled to recover; but if you find either of these questions against him, he is not entitled to recover.

If you find for the plaintiff, you will then come to the question of damages. In determining that you will consider

the pain and suffering to which he has been subjected, both mental and physical, the loss of time and loss of wages which has resulted from his injury, the nature and extent of his physical injuries, their effect upon his ability to earn his living since the accident as compared with his ability to do so before, and the probable effect of those injuries upon his future health and strength. Under all these circumstances, and in view of all these facts, you will estimate the damages, and give him such sum as you think will be a reasonable, not an unreasonable, compensation.

You have nothing to do, gentlemen, with the fact that this case has once been tried in this court, or with what some other jury may have determined about it. You are to consider it upon the evidence adduced before you upon this trial, and upon the instructions which I have now given you.

E. L. Johnson, for plaintiff.

Willard Teller, for defendant.

GAY *v.* JOPLIN.

(Eastern District of Missouri. October, 1888.)

1. EVIDENCE — BURDEN OF PROOF. — Where, in a suit for rent, the defendant admits the fact of the tenancy at the rate stated in the petition, the burden of proof is upon him to show that the rent has been paid.
2. LANDLORD AND TENANT. — In the absence of any agreement, a tenant is not entitled to compensation for improvements voluntarily placed by him upon the leasehold.
3. PRACTICE — AMENDMENT OF VERDICT — REV. ST. § 954. — Section 954 of the Revised Statutes of the United States authorizes the amendment of informal verdicts, so as to make them conform to technical requirements.

Suit for rent. Motion for a new trial.

The petition in this case sets out in form three distinct causes of action, viz., the balance of rent due for each of three successive years under a lease from year to year. The answer sets up a counterclaim for work done upon the leased property during the period of the tenancy by the lessee, at the lessor's request.

The case was tried before a jury. During the trial the plaintiff asked leave to amend by consolidating the three causes into one. The defendant objected, and the court said that the amendment was unnecessary, as the court would, in its charge, present the case to the jury as for the whole amount of rent due. The charge to the jury was as follows:

TREAT, *District Judge (charging jury).*— As it is admitted in this case that the defendant was the tenant of plaintiff at the rate stated, of $650 a year, the burden of proof is upon him to show that the rent has been paid, or how much has been paid, and also to establish his counterclaim. It is for you, in the light of the evidence that has been given, to ascertain what amount of rent is still due, if any. Having ascertained that, proceed to the next inquiry concerning this counterclaim.

Probably it is quite as familiar to you, and possibly more so than to the court, that what has been done by a tenant in the office of good husbandry he gets no compensation for against his landlord, because it is expected that each tenant tilling the land and attending to it will do whatever is essential to good husbandry.

It is contended, on the part of the defendant here, that there was an agreement or understanding that either he should have a ten years' lease, or that the landlord, the plaintiff in this case, would compensate him for such permanent improvements as he might make. Now, if such an agreement or understanding existed, and permanent improvements were made, the party would be entitled to receive proper compensation therefor. If there was no understanding of

that nature in regard to it, then any voluntary improvements that he made he cannot charge against his landlord. Consequently the question with regard to the counterclaim is, as has been stated to you, was there an agreement or understanding of the nature contended for by the defendant with regard to any of these improvements, for which he puts in this counterclaim? Remarking, however, gentlemen, as it is admitted by the plaintiff, that the item in the counterclaim of $35 would be allowed under any circumstances, if, after ascertaining what rent is due, you reject the counterclaim, you will give the amount thus ascertained in your verdict for the plaintiff. If you allow the counter claim, strike a balance, and if the balance is in favor of the plaintiff, give him the balance. If there is a balance against him, give the balance in favor of the defendant.

The jury found a verdict in gross for the defendant.

The plaintiff thereupon moved the court to set aside the verdict and grant a new trial for the following, among other, reasons, viz.:

(2) Because the court erred in refusing to allow plaintiff to amend his petition to conform the sum to the proofs in the case, when leave so to do was asked by plaintiff before the case was submitted to the jury. (3) Because the court erred in matter of law in the charge and instructions given to the jury. (4) Because the court instructed the jury to render their verdict in gross upon the three causes of action stated in the plaintiff's petition, together with six causes of action stated in defendant's counterclaim. (5) Because the verdict is not responsive to the issues made in the pleadings. (6) Because the verdict is contrary to the law and the evidence, and the weight of evidence. (7) Because the verdict is uncertain, indefinite and informal, and insufficient to sustain a judgment.

Opinion of the court upon motion for a new trial:

Edward Cunningham, for plaintiff.

Dinning & Byrns, for defendant.

TREAT, *District Judge.*— The petition does not count on a written lease, nor was such a lease filed with the petition as the statute requires, hence the trial proceeded as on a verbal lease for $650 per year, which the answer admitted. If a written lease contained specific terms or provisions of which the plaintiff desired to avail himself, these terms should have been set out or averred and the lease filed. The answer and counterclaim informed the plaintiff of the nature of the defense; showing, if there was a written lease of whose terms the plaintiff sought advantage, the necessity of conforming to the statute; otherwise the proofs would not conform to the pleadings, and the defendant be, at the trial, taken at disadvantage and surprise.

The petition sets out in form three distinct causes of action, viz., the balance due for rent on each of three successive years. After the trial had progressed for some time the plaintiff asked to amend by consolidating the three causes into one, and the court remarked that such an amendment was unnecessary, against defendant's objection; for in its charge the court would present the case to the jury as for the whole amount of rent due.

The charge was given accordingly. The plaintiff, therefore, had all the benefits he sought by his proposed amendment.

It is now objected that the verdict did not state the finding of the jury separately as to each of the three causes of action. It is manifest, especially in connection with the charge, what the jury must have found with respect thereto, and with respect to the counterclaim. The defect was one merely of form, and the verdict is amendable. The court could then have conformed it to technical requirements, and can do so now if necessary. The statutes of the United States and the many rulings thereunder by the United States supreme court, sustain this view of the question. Without

reviewing the many decisions, reference is made to the following, which enunciate the doctrines governing the motion in arrest: *Shaw* v. *Railroad Co.* 101 U. S. 557; *Lincoln* v. *Iron Co.* 103 U. S. 412; *Koon* v. *Ins. Co.* 104 U. S. 106; Rev. St. § 954.

Both motions are overruled.

NOTE.[1] — AMENDMENTS — IN GENERAL. — Section 954 is remedial, and should be liberally construed (*Parks* v. *Turner*, 12 How. 39; *Tobey* v. *Claflin*, 3 Sumn. 379; *Gregg* v. *Gier*, 4 McLean, 308), but amendments are not allowed with such liberality in penal actions or forfeitures as in civil actions (*U. S.* v. *Batchelder*, 9 Int. Rev. Rec. 98), and a criminal information cannot be amended at the trial in any manner affecting the charge. *Columbia* v. *Herlihy*, 1 McArthur, 466. The power to amend at common law was limited to trivial errors, and could not be exercised after final judgment (*Smith* v. *Allyn*, 1 Paine, 453; *Nelson* v. *Barker*, 3 McLean, 379); but this section empowers generally any United States court to disregard mere defects in form in giving judgment, except those which the party demurring sets down as the cause of the demurrer (*Rosenbach* v. *Dreyfuss*, 1 Fed. Rep. 394), and authorizes the allowance of amendments during the trial. *Bamberger* v. *Terry*, 1 Morr. Trans. 581. It embraces every step in the cause down to the judgment. *Roach* v. *Hulings*, 16 Pet. 319. Where no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in others (*Tilton* v. *Corfield*, 93 U. S. 163); and amendments of mere form, not going to the merits, and not of such a character as to prejudice, will not entitle respondents to costs. *The Edwin Post*, 6 Fed. Rep. 314. A defect is formal when a defendant must of necessity be guilty of a breach of the law, and liable to an action if the declaration is true. *Jacobi* v. *U. S.* 1 Brock. 520. This section, except the last clause, relates to defects which are mere matters of form, and the last clause embraces matters of substance. *Smith* v. *Allyn*, 1 Paine, 153. The power is confined to process and pleadings, and reaches all defects, but does not extend to the judgment. Id. It extends to actions brought by the United States. *Jacobi* v. *U. S.* 1 Brock. 520.

AMENDMENT OF VERDICT. — The words "or course of proceeding whatever" are broad enough to include verdicts (*Parks* v. *Turner*, 12 How. 39); so if a verdict is general, it may be amended so as to apply to the count under which the evidence is given. *Matheson* v. *Grant*, 2 How. 263; *Stockton* v. *Bishop*, 4 How. 155. Leave may be granted to amend a verdict in replevin after the jury had returned and another

[1] From *Federal Reporter*.

cause had been tried. *Argueles* v. *Wood*, 2 Cranch C. C. 579. A verdict in *assumpsit*, "that defendant is guilty in manner and form as alleged," is amendable. *Lincoln* v. *Iron Co.* 103 U. S. 412. On a stipulation that the jury, if the court be not in session when they agree upon their verdict, may sign, seal and deliver it to the officer in charge, and disperse, the entry of the verdict in proper form is allowed by this section. *Koon* v. *Ins. Co.* 104 U. S. 106; *S. C.* 3 Morr. Trans. 125.

AMENDMENTS AFTER VERDICT.— A defective pleading may be cured after verdict (*Garland* v. *Davis*, 4 How. 131; *Clark* v. *Sohier*, 1 Wood & M. 368); and the rule that a defective statement of a good cause of action is cured by the verdict extends to penal actions. *Smith* v. *U. S.* 1 Gall. 261. All circumstances necessary in form or in substance to make out a cause of action, though imperfectly stated, must be proved at the trial; hence the defect is cured by the verdict (*Pearson* v. *Bank*, 1 Pet. 89; *Matheson* v. *Grant*, 2 How. 263; *Stockton* v. *Bishop*, 4 How. 155; *De Solry* v. *Nicholson*, 3 Wall. 420; *Corcoran* v. *Dougherty*, 4 Cranch C. C. 205; *Scull* v. *Higgins*, Hemp. 90; *Stanley* v. *Whipple*, 2 McLean, 35; *Kemble* v. *Lull*, 3 McLean, 272; *Gray* v. *James*, Pet. C. C. 476; *Dobson* v. *Campbell*, 1 Sumn. 319); as an allegation under a *videlicet* (*Ingle* v. *Collard*, 1 Cranch C. C. 152; *Woodward* v. *Brown*, 13 Pet. 1); or the omission to join a party as plaintiff who ought to have been joined (*Greenleaf* v. *Schell*, 6 Blatchf. 225); or to give the time when the injury was done (*Stockton* v. *Bishop*, 4 How. 155); or to aver the value of the foreign money in an action on a bill of exchange (*Brown* v. *Barry*, 3 Dall. 365); as a declaration in debt is in the *debit* as well as the *detinet* (id.; *Gardner* v. *Lindo*, 1 Cranch C. C. 78); but if it omits to show matters essential to the jurisdiction (*Smith* v. *Allyn*, 1 Paine, 486), or to state a cause of action, it is not cured by the verdict (*Smith v. Allyn*, 1 Paine, 486; *Renner* v. *Bank*, 9 Wheat. 581; *McDonald* v. *Hobson*, 7 How. 745; *Washington* v. *Ogden*, 1 Black, 450); or if a libel *in rem* does not show the commission of an offense. See *The Virgin*, Pet. C. C. 7. An alternative allegation in an action of debt for a penalty can only be objected to by a demurrer, and is cured by a verdict. *Jacobi* v. *U. S.* 1 Brock. 520. An objection that the declaration does not make *profert* of letters of administration cannot be taken after verdict. *Gardner* v. *Lindo*, 1 Cranch C. C. 78; *Matheson* v. *Grant*, 2 How. 263. If a declaration merely assigns the non-payment of the penal sum on a bond, an omission to assign a special breach of the condition, in a replication to a plea of performance, is cured by a verdict. *Minor* v. *Mechanics' Bank*, 1 Pet. 46. A verdict will cure a discontinuance caused by the failure of the executor to appear within the proper time after suggestion of the death of the plaintiff. *Brent* v. *Coyle*, 2 Cranch C. C. 287. An allegation under a *videlicet* may be disregarded. If the breach alleged is not a breach of the covenant, error is not cured by verdict. *Ingle* v. *Col-*

lard, 1 Cranch C. C. 152. A plea of *non-assumpsit*, in an action on the case, is not cured by a verdict. *Garland* v. *Davis*, 4 How. 131. Where two pleas present substantially the same issue, the fact that an immaterial issue is joined on the replication to one plea is no reason for arresting a judgment and awarding a repleader (*Erskine* v. *Hornbach*, 14 Wall. 613; *Pegram* v. *U. S.* 1 Brock. 261); so if plaintiff replies to only one. *Laber* v. *Cooper*, 7 Wall. 565. Although a decision sustaining a demurrer to a plea is erroneous, yet if the defense can be presented under another plea filed, the judgment will be good. *Junction R. Co.* v. *Bank*, 12 Wall. 226. Where there is a defect in a pleading, yet if the issue be such as required proof of the facts so defectively stated or omitted, and without which it is not to be presumed the judge would have directed a verdict, such defect is cured. *Lincoln Township* v. *Cambria Iron Co.* 2 Morr. Trans. 563.

JUDGMENTS AND DECREES.—All judgments, decrees or orders are under control of the court which pronounces them during the term at which they are rendered, and may be set aside, vacated or modified. *Bronson* v. *Schulten*, 8 Morr. Trans. 500. But amendments to judgments or decrees cannot be made except as to formal defects (*Allers* v. *Whitney*, 1 Story, 310), where the entry was erroneously made (*U. S.* v. *Bennett*, Hoff. 281), or where there is a verbal mistake of the clerk in using a superfluity of words in entering judgment (*Shaw* v. *Railroad Co.* 101 U. S. 557), or where by a misprision of the clerk the judgment had not been entered according to the declaration (*Woodward* v. *Brown*, 13 Pet. 1), or where the clerk had omitted to enter judgment allowing interest (*Bank* v. *Wistar*, 3 Pet. 431), or if a judgment by confession is entered without declaration or rule to plead (*Ault* v. *Elliott*, 2 Cranch C. C. 372), or if made by only one of several joint defendants (*Hyler* v. *Hyatt*, id. 633; *Newton* v. *Weaver*, id. 685; see *Ringgold* v. *Elliott*, id. 462), or if entered in a wrong case (*Pierce* v. *Turner*, 1 Cranch C. C. 433), or if made by an attorney by mistake. *Bank* v. *McKinney*, 3 Cranch C. C. 173. A judgment may be amended by striking out a part which the court has no authority to make (*The Hiram Wood*, 6 Chi. Leg. News, 135), or where it was entered by mistake (*U. S.* v. *Fearson*, 5 Cranch C. C. 95), any clerical error may be corrected after the lapse of the term (*Scott* v. *Blaine*, Bald. 287; *Brush* v. *Robbins*, 3 McLean, 486), as by making it payable in gold or silver coin. *Cheang Kee* v. *U. S.* 3 Wall. 320. A judgment or decree cannot be stricken out after the lapse of the term at which it is rendered (*Brush* v. *Robbins*, 3 McLean, 486; *Wood* v. *Luse*, 4 McLean, 254; *Scott* v. *Blaine*, Bald. 287); but if irregularly entered it may be set aside (*Union Bank* v. *Crittenden*, 2 Cranch C. C. 238), or for a mistake in the assessment of damages (*Crooks* v. *Maxwell*, 6 Blatchf. 468), or if considered as a nullity. *Wood* v. *Luse*, 4 McLean, 254; *Harris* v. *Harde-*

man, 14 How. 334. Though the court cannot change the essential parts of a decree after the term at which it is entered, yet it may subsequently amend the decree as to the mode of execution, manner of sale, time of publication, and distribution of proceeds (*Turner* v. *I. B. & W. R. Co.* 8 Biss. 380); but an interlocutory decree is always open to amendment and correction. *De Floven* v. *Reynolds*, 8 Fed. Rep. 434.—ED.

PHELAN *v.* O'BRIEN.

(Eastern District of Missouri. October, 1882.)

1. BANKRUPTCY — LIMITATION OF ACTION — REV. ST. § 5057.— Where a deed of trust upon real estate, executed by A. to secure certain promissory notes, was foreclosed by B., who, as assignee in bankruptcy of the estate of C., held one of said notes, and all parties in interest were present or represented at the sale under said deed, and B., with the sanction of the court by which he had been appointed, became the purchaser for the benefit of C.'s estate, and with the knowledge of A. paid the holders of the other notes their *pro rata* of the purchase money, *held*, that proceedings instituted by A. against B. more than two years after the date of said sale, to set it aside, were barred by the limitations of the bankrupt act.
2. SAME — ESTOPPEL.— *Held, also*, that the fact that B. represented to A. after the purchase that he would permit her to redeem the land upon payment of the debt, but without fixing any time for redemption, did not estop him from setting up the statute of limitations.

In equity.

Appeal from the United States district court, sitting as a court in bankruptcy.

For statement of facts and report of the opinion of the district court, see 12 Fed. Rep. 428.

Donovan & Conroy, for complainant in cross-bill.

Walker & Walker, contra.

MCCRARY, *Circuit Judge.*— The respondent, Elizabeth O'Brien, brought a suit in equity in one of the state courts of this state to set aside a sale of certain lands to the complain-

ant, as assignee in bankruptcy of the Central Savings Bank, which sale was made under a deed of trust given by her to secure certain debts, including one due to the bankrupt. The complainant filed his original bill herein to enjoin the proceedings in the state court, and a preliminary injunction was issued. Thereupon respondent filed her cross-bill herein, renewing substantially her suit as originally brought in the state court.

One defense to the cross-bill is that the cause of action therein set forth was barred by the provision of section 5057 of the Revised Statutes of the United States, which provides that "No suit, either at law or in equity, shall be maintained in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

The assignee purchased the property at trustees' sale on the twentieth day of September, 1878, and on the twenty-third day of that month the trustee in the deed of trust conveyed the property by deed to him as assignee. The suit in the state court to set aside the sale was commenced January 10, 1881, more than two years after the purchase by the assignee and the conveyance to him. The court is constrained to hold that the bar of the statute is a complete defense.

It has been repeatedly held by the supreme court of the United States that the limitation embodied in the section above quoted applies to all judicial contests between an assignee and other persons touching the property or rights of property of the bankrupt transferred to or vested in the assignee, where the interests are adverse, and have so existed for more than two years from the time when the cause of action accrued for or against the assignee. *Bailey* v. *Glover*, 21 Wall. 346; *Gifford* v. *Helms*, 98 U. S. 248.

It is suggested that the statute does not apply to a controversy between an assignee and other persons respecting prop-

erty acquired by the assignee after the bankruptcy, and not conveyed to him by the original assignment. The *Case of Conant*, 5 Blatchf. 54, is cited to sustain this view, and it seems to do so. That case arose under the limitation clause of the bankruptcy act of 1841, which is substantially analogous to the provision now under consideration; and it holds that the limitation has no reference to contests growing out of the dealings of the assignee with the estate after it comes into his hands. A later ruling of the supreme court of the United States in the case of *Banks* v. *Ogden*, 2 Wall. 57, would seem to support very strongly the opposite view. The court in that case impliedly held that the limitation applies to a cause which accrued after the bankruptcy, and that it limited the time within which to commence an action to two years from the time when such cause of action accrued. The language of the court is as follows:

"The limitation certainly could not affect any suit, the cause of which accrued from the adverse possession taken after the bankruptcy, until the expiration of two years from the time of such possession."

In the case of *Norton* v. *De La Villebeuve*, 13 N. B. R. 304, precisely the opposite view of the statute was urged upon the consideration of the court. It was there insisted that the limitation only applies to new causes of action arising in favor of the assignee after the bankruptcy, and not to those which had existed before the bankruptcy, and had come to the assignee by the assignment.

In the elaborate opinion announced by Woods, circuit judge, it was held to apply to both classes of cases. The court said:

"In our view, on all matured claims and demands the cause of action accrues to the assignee at the day of the assignment; all others from their maturity, or at the time when an action will lie; and he must sue within two years from these dates respectively."

The object and purpose of the limitation in question was

to insure a speedy disposal of the bankrupt's property, and a prompt closing up of his estate. This object is declared by the supreme court, in *Bailey* v. *Glover*, *supra*, to be second only in importance to equality of distribution. It is easy to see that the construction of the statute insisted upon by counsel for respondent would defeat this object. If the ordinary statutes of limitation were to apply to all controversies arising between the assignee and other parties pending the proceedings in bankruptcy, the settlement of estates might be delayed almost indefinitely. The assignee threatened with a suit could not, with safety, close his administration until after the expiration of the limitation fixed by the general statutes upon this subject. Suits might be instituted against him within the periods fixed by such statutes, but near the close of such periods, which might remain in the courts for many years. In fact, the limitation contained in the bankrupt act would, in many cases, prove ineffectual as a means of speeding the settlement of estates in bankruptcy, if it were not applied to controversies such as the one before us. Besides, the language of the statute is so general as not to admit of the limitation insisted upon. It applies to all suits, whether at law or in equity, touching any property or rights of property transferred to or vested in the assignee. It therefore includes suits touching property transferred to an assignee by the assignment, and also those touching property vested in such assignee either by the assignment or otherwise.

Proof has been offered to show that this assignee ought to be estopped from pleading the statute of limitations, because, after his purchase, he represented to the respondent that he would permit her to redeem the land upon payment of the debt. There is proof tending to show that such was the fact; but this alone is not sufficient to take the case out of the statute of limitations. No time for redemption was fixed, and no time to redeem is shown. The most that can be claimed is that respondent was to have the right or privilege

to redeem indefinitely. If such was the agreement, it was void for want of mutuality, and not sufficient to prevent the running of the statute of limitations. *Taylor* v. *Reid*, 103 Ill. 349; *Kellogg* v. *Carrico*, 47 Mo. 157; *Mansur* v. *Willard*, 57 Mo. 347; *Medsker* v. *Swaney*, 45 Mo. 278; *Carter* v. *Abshire*, 48 Mo. 300; *Martin* v. *Smith*, 1 Dill. 96; *Langdon* v. *Doud*, 10 Allen, 433; Bigelow, Estoppel, 481–483.

The result is that, without considering the various questions touching the merits of the controversy, the decree of the district court must be affirmed, and it is so ordered.

DARLING, Assignee, etc., *v.* BERRY and wife and others.

(District of Iowa. 1882.)

1. BANKRUPTCY — REV. ST. § 5045 — HOMESTEAD EXEMPTION. — By the passage of the act of March 3, 1873, embodied in section 5045 of the Revised Statutes, it was the intention of congress to prescribe by its own direct legislative authority, irrespective of state laws, the *conditions* upon which the homestead exemptions should exist, making the provisions of the state laws "existing" in 1871 the *measure* or *criterion* as to the *amount* allowed.
2. SAME — SAME — SAME — TIME DEBT WAS CONTRACTED. — Under section 5045, Rev. St., the bankrupt's homestead exemption is valid against *all debts*, whether reduced to judgment or not, without regard to the *time* when contracted, and regardless of state constitutions, laws and decisions.
3. SAME — SAME — CONSTITUTIONALITY OF. — A bankrupt, revenue or naturalization law, which, by its terms, is made applicable alike to *all* the states, without distinction or discrimination, is not unconstitutional merely because its *operations* may be wholly different in one state from another.
4. RULE AS TO CONSTRUCTION OF LAW. — Where the constitutionality of a law is a matter of doubt, and the decisions upon the question are conflicting, to set aside such an act as unconstitutional would be presumption in an inferior judge.

The plaintiff in this case is the assignee in bankruptcy of the firm of Parsons, Berry & Warren, of which the defendant, William A. Berry, was a member. The object of the bill is to assert the claim of a creditor of the said firm, D. W. Grimes, against the homestead of said Berry. It is conceded that the debt of the claimant, Grimes, was contracted prior in time to the purchase and acquisition of the homestead, and therefore that by the law of Iowa the homestead was not exempted from the payment of the debt. By the law of Iowa the claimant had a clear right to enforce his claim against the homestead by judgment and execution. The claimant may, therefore, we think, through the present plaintiff, as assignee in bankruptcy, maintain this bill, unless he had been deprived of his right to subject the homestead to the payment of his claim by the amendment to the bankrupt law passed March 4, 1873. That amendment provided that there should be exempted from the operation of the assignment in favor of the bankrupt such property "as is exempt from levy and sale upon execution or other process or order of any court, by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws of each state, as existing in the year 1871, and such exemptions shall be valid against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court; any decision of any such court, rendered since the adoption and passage of such constitution and laws, to the contrary notwithstanding."

John C. Power and *P. Henry Smythe*, for plaintiff.

A. M. Antrobus, *Thomas Hedge, Jr.*, and *Anderson Bros. & Davis*, for defendants.

LOVE, *District Judge.*—*First.* The plaintiff's counsel contend that "the bankrupt law did not intend to exempt

anything which the legislature of the state had not exempted or sought to exempt by its law," and counsel say: "We deduce, therefore, that if the bankrupt law only intends to exempt such property as the state law did, or meant to make the state law the measure of exemption, then the property here is not exempt for the reason that it is not by the state statute." *Secondly.* Counsel insist that "if the bankrupt law did intend to go further and create a new exemption by the bankrupt law itself, and which the state law did not give, it is void, being unconstitutional, there being no uniformity in it."

With respect to the first of these propositions, which involves the construction of the amendment of March, 1873 (Rev. Stat. § 5045), I must confess that my own judgment was, when the case was argued before me in the district court, with the plaintiff's counsel; but I have been led by a more thorough consideration of the question to change my opinion upon that point.

The question is, was it the purpose of congress, in giving the bankrupt's homestead exemptions, simply to recognize the state laws as furnishing the rule with respect to both the amount exempted and the conditions of exemption, or was it intended by congress to prescribe by its own direct legislative authority, irrespective of state laws, the conditions upon which the homestead exemptions should exist, making the provisions of the state laws "existing" in 1871 the measure or criterion as to the "amount allowed?" As a matter of course, congress could not have intended to prescribe directly and by its own authority the conditions of the homestead, and at the same time, by the same act of legislation, accept the conditions provided by the various state laws. We must inevitably accept one hypothesis or the other, and not both, in the construction of the act. The true purpose of congress may be demonstrated by considering the causes and events which led to the amendment of 1873. It is undeniable—indeed, it is admitted on all hands—that the condition of

things in Virginia, growing out of her legislation, constitutional and otherwise, regulating homestead exemptions, led to the amendment of 1873.

By article 11 of the constitution of that state, adopted in 1869, it was provided that every householder or head of a family should be entitled, in addition to the articles then exempt from levy or distress for rent, to hold exempt from levy and sale under execution, etc., issued on any demand for any debt theretofore or thereafter contracted, his real and personal property, etc., to the value of $2,000, to be selected by him. An act of the general assembly of Virginia, approved June 27, 1870, gave effect to this provision by prescribing in what manner and upon what conditions such householder could set apart and hold such exemptions. Under the bankrupt law, as originally enacted, there was exempted from the assignment of property required to be made to the assignee, among other, such property as was exempt from levy and sale under execution by the laws of the state, etc., to an amount not exceeding that allowed by the state exemption law in the year 1864.

By an amendatory act passed on the eighth of June, 1872, this provision was changed so as to give the bankrupt the benefit of exemption laws in force in 1871. In 1872 the court of appeals of Virginia unanimously decided (22 Grat. 266) that the provision of the constitution just referred to, and the statute giving effect to the same, so far as they applied to contracts entered into or debts contracted before their adoption, were a violation of the constitution of the United States, and therefore void. After this decision, on the third of March, 1873, congress passed another act, which is substantially the same as section 5045 of the revision. The amendment of 1873 is as follows:

"Be it enacted, etc., that it was the true intent and meaning of the act approved June 8, 1872, entitled, etc., that the exemption allowed the bankrupt by said amendatory act should, and it is hereby enacted that they shall, be the

amount allowed by the constitution and laws of each state, respectively, as existing in the year 1871, and that such exemption be valid against debts contracted before the adoption and passage of said state constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court; any decision of any such court, rendered since the adoption and passage of such constitution and laws, to the contrary notwithstanding."

Here we find that the law of Virginia giving retrospective homestead exemptions was declared null and void because it impaired the obligation of contracts. Such exemptions, therefore, did not exist in Virginia when the amendment of 1873 was passed. Congress, it is admitted, aimed by the amendment to do what Virginia had not been able to accomplish, namely, to give the bankrupt the benefit of the retrospective homestead exemptions which had been annulled in Virginia. This congress was fully empowered to accomplish. Congress could, by its own direct legislation, pass a law impairing the obligation of contracts, but congress could not make a state law which violated the constitution valid. Did congress intend to recognize and adopt, as furnishing a rule to its courts in the administration of the bankrupt law, state legislation which was utterly void by reason of its violation of the federal constitution? Could congress breathe the breath of life into a dead state law — dead by reason of its repugnance to the constitution? So far from its being the purpose of congress to adopt or respect the law of Virginia touching homestead exemptions, it was manifestly intended by the amendment to overrule and disregard the state law; for, by the law of Virginia as it stood after the decision in 22 Grattan, the creditor had a clear right to satisfaction out of the debtor's property, without regard to his claim of homestead, and the creditor might have secured a lien upon the property claimed as a homestead by the judgment or decree of the Virginia courts. Congress, therefore, could not effect its purpose by giving a retrospective homestead in Virginia under the bank-

rupt law without utterly disregarding the Virginia law and overriding any liens which might be established by the judgments of its courts; and if there is any meaning in words, this is precisely what congress aimed in express terms to do.

It being thus manifest that no valid law existed in Virginia creating a retrospective homestead, congress could not establish such an exemption by adopting or recognizing what did not exist. Congress, therefore, could accomplish its admitted purpose in Virginia only by direct legislation giving the bankrupt a homestead against debts which had been adjudged to be valid claims upon the homestead under the law of that state. Now, is this consistent with the view that congress intended to adopt state laws "in existence," whether in force or not, whether repealed or not repealed, whether constitutional or otherwise, as a measure of the amount of property to be exempted? The original bankrupt act of 1867 limited the amount of exemption by the state laws in force in 1864, though possibly repealed or not in force in 1867, or when the proceeding in bankruptcy should be commenced.

I have hitherto considered the question with reference to the intention of congress to prescribe a homestead in Virginia without reference to the laws of that state; or, rather, in contravention of its existing law. I have so considered the question because there can be and is no serious doubt that congress intended, with reference to the condition of things in Virginia, at least, to provide for a homestead by its own direct legislative power to pass a general and uniform bankrupt law. But although congress, in adopting the legislation in question, had in view the exigency existing in Virginia, yet it could not pass a special law to meet the state of things relating to the homestead in that state, without applying its provisions to the other states; since such a law applicable to the condition of things in Virginia alone, and not to the other states, would clearly have been unconstitutional. It would not have been a uniform bankrupt law. Congress could not, without a flagrant violation of the fed-

eral constitution, have so framed a law as to give the bankrupt in Virginia a homestead exemption in disregard of the state law, and in contravention of liens by judgment and decree, without making the same provisions applicable to other states. It would have been simply absurd for congress to have attempted to make such a provision for bankrupts in Virginia by its own direct legislation, and to have provided, as to the other states, that their own laws should prescribe the conditions as to debts upon which the bankrupt should be entitled to the homestead. Hence congress was compelled, in order to provide a homestead against antecedent debts in Virginia, where no such homestead law was in force, to frame a law with general provisions, applicable alike to Virginia and all other states where homestead laws existed. This could only be accomplished by a law of congress prescribing directly the conditions of exemption against prior creditors for all the states alike, without reference to state statutes, except in so far as they might be taken as a criterion or measure of the amount of property to be exempted.

From these general views, which seem to my mind conclusive, let us turn to the particular language of the amendment. It is provided that "such exemptions shall be valid against debts contracted before the adoption and passage of such state constitutions and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court; any decision of any such court rendered since the adoption and passage of such constitutions and laws to the contrary notwithstanding." These words must have some construction; they cannot be rejected as surplusage; they are not ambiguous. What do they mean? What can they mean except that the bankrupt's homestead exemption shall be valid against all debts, without regard to the time when contracted, and regardless of state constitutions, laws and decisions? The exemption shall be valid against debts contracted before and after the passage of laws, etc., "in existence" in 1871, and against the judgments and de-

crees of *any* state court. Time before and after an event includes all time, and therefore the words used in the amendment imply that the exemption shall be valid against debts at whatever time contracted. They can mean nothing else. To extort any other meaning from them by interpretation would be to violate the fundamental maxim of construction. "The first maxim of interpretation," says Vattel, "is that it is not allowable to interpret what has no need of interpretation;" and he proceeds to point out the fatal and mischievous consequences of violating this rule in the interpretation of deeds and treaties.

The words "debts contracted" before and after the passage of a law, etc., must, *ex vi termini*, mean *all* debts, and not some particular debts to the exclusion of others. If we reject this interpretation, how shall we discriminate between debts which are and debts which are not included in the provision? What rule of classification shall we adopt? Congress manifestly did not intend to make any such discrimination, for congress in express terms made the exemption valid against the very highest class of debts, namely, such as were made *liens* against the homestead by the solemn judgments and decrees of state courts. It had been the policy of all bankrupt laws to respect and preserve the liens of creditors under state laws and decisions; and the doctrine that the adjudications of the state courts upon state constitutions and laws should be accepted and enforced in all federal tribunals, had, long before the legislation we are now considering, been embedded in the very foundations of federal law. Yet here we find congress providing that the bankrupt's homestead exemption should prevail against state laws, and state decisions and liens established by the solemn judgments and decrees of state courts. By what possible terms could the will of congress have been made more conclusively manifest that the bankrupt's homestead should prevail, by the exclusive authority of congress, against all debts in spite of state laws, decisions and judgments? We know positively

that such was the intention of congress with respect to debts secured by the laws, judgments and judicial decisions of the state of Virginia, and how can we suppose that congress did not intend that debts in other states should be subject to the same conditions as against the homestead? Did congress intend to make one law for Virginia and another and different law for the other states?

The claimant's debt is a mere float. It has never been reduced to judgment. It is no lien upon the bankrupt's homestead. It is a valid claim under the law of Iowa against the homestead; nothing more. This debt is clearly, at whatever time contracted, whether before or after the passage of certain *state* laws, within the express terms of the act of congress postponing debts to the homestead exemptions. What reason is there to take the plaintiff's claim out of the act? Is it because it was valid under the law of Iowa against the homestead? So were the debts in Virginia, which, it is admitted, the amendment intended to set aside in favor of the homestead. Nay, it would appear that some of the Virginia creditors had established their claims as liens against the homestead by the judgments and decrees of the courts of their state; and these liens against the homestead as well as other judgment liens, it was the manifest purpose of the amendment of 1873 to subvert. Would it not, then, be most unreasonable to suppose that it was the purpose of the amendment of 1873 to subvert and set aside the judgment liens of other creditors against the homestead, and save such mere floating claims as that of the plaintiff? Suppose the claimant had reduced his demand to judgment, and had thus made it a lien upon the homestead; he would then have brought himself within the very words of the amendment, that the exemption should be valid "against liens by judgment or decree of *any* state court." In that case, would not the amendment have set aside his lien in favor of the homestead; and is he now better off because his claim remains in its original shape, of a floating claim against the homestead exemption?

I can see no difference between the case of the creditors under the Virginia law which congress intended to set aside in favor of the homestead, and the claimant's case under the law of Iowa. The claimant had a right by the law of Iowa to satisfaction out of the bankrupt's property without respect to the homestead. He might have enforced his claim by judgment and secured a lien. The same is true with respect to the rights of the creditors in Virginia under the law of the state. It cannot be doubted that congress intended to postpone the Virginia creditors to the right of homestead, and to establish the same even as against liens by judgment and decree. Why should a different intention be imputed to congress in regard to an Iowa creditor? Why should not the same result to which the Virginia creditors were exposed occur to an Iowa creditor, if the bankrupt act is a uniform law?

The section (5045) which we are considering provides that there shall be exempted:

"Such other property, etc., as is exempted from levy and sale upon execution or other process, or order of any court, by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws of each state as existing in the year 1871."

The word "existing" is here evidently used for a purpose. There was no law giving a retrospective homestead exemption "in force" in Virginia in 1871. The law which had been passed being unconstitutional, and so declared by the highest court of the state, was a dead letter; it was not in force, but in one sense it existed in 1871. It had no potential "existence," but it "existed" in form. So there may have been in other states exemption laws which "existed" either potentially or in form in 1871, but which, perhaps, were not in force when the amendment of 1873 was passed. I think it must have been the purpose of congress to adopt these state laws "existing" in 1871, whether potentially or

in form, whether repeated or not, whether in force or not in force, so far as they furnished a measure of the amount of homestead exemption. If there was in any state no law at all existing in 1871, "either potentially or in form," it is clear that the legislation of the section of the bankrupt law in question could not be applied to bankrupt estates in such states. I can see no other construction of section 5045 by which the provision last above quoted can be made to harmonize with the terms of the section immediately following, upon which the present case turns.

Let us now proceed to consider the constitutional question. With due deference, I venture to suggest that the judges who have discussed the constitutionality of this amendment have applied to it an erroneous test of uniformity. They seem to me to treat the question as depending rather upon the operation or working of the law than upon its application according to its own terms to the various states of the Union. In my opinion, when a bankrupt, revenue or naturalization law is made by its terms applicable alike to all the states of the Union, without distinction or discrimination, it cannot be successfully questioned on the ground that it is not uniform, in the sense of the constitution, merely because its operation or working may be wholly different in one state from another. The circumstances and conditions existing in the states of this Union are infinitely various. No law which human ingenuity could possibly frame would be uniform in the sense of operating equally or alike in the various states, with their different conditions and diversified interests. The constitution provides that "all duties, imposts and excises shall be uniform throughout the United States." Now, suppose one or more states should succeed in suppressing utterly the manufacture and sale of ardent spirits and malt liquors, then a federal tax upon these commodities would be entirely inoperative in such states. In such case millions might be collected under an excise law in Illinois, and not a cent in Iowa. The operation of such a

law would then be anything but uniform in the two states; but would any court for that reason declare a general law imposing a tax of the kind unconstitutional? Again, a tariff law might be anything but uniform in its operation upon different states. It might foster the industry of a manufacturing state, and oppress that of a strictly agricultural state. But could it on this account be said to be not a uniform law within the meaning of the constitution, and therefore void? Suppose, again, congress should in a bankrupt law, as it did in 1867, adopt the homestead exemptions prescribed by state laws in force at a specified time; and suppose there should in some states be no law giving homestead exemptions, while in others such exemptions should by law exist,—then the operation of the bankrupt law would not be uniform with respect to the homesteads; but would it be for that reason unconstitutional? All that the constitution intends is that congress shall not pass partial revenue and bankrupt laws. It shall not prescribe one law for this state or section, and a different law for that state or section. The law must be general and uniform in its provisions, but its working and operation may be very different in different states, owing to their diverse conditions and circumstances. Congress can prescribe a uniform law, but it cannot create uniform conditions and circumstances in the various states of the Union.

Now, applying these principles, I am not able to see that the amendment of 1873 is unconstitutional. The amendment does not by its terms apply to any state or section. It is prescribed for all the states alike. Congress by this amendment prescribed by direct legislation in contravention of state laws the conditions upon which the bankrupt should take his homestead. These conditions are applicable to all the states without distinction. The act of 1867 provided that the bankrupt should be entitled to the homestead allowed by the state of his domicile, in force when the proceedings in bankruptcy were commenced, "not exceeding that al-

lowed by the state exemption laws in force in 1864." It is clear that under this act one law of the state might prescribe the conditions of the right of homestead and another regulate the amount of property to be allowed. But in the amendment of 1873 the conditions are prescribed directly by the act of congress, and the amount to be regulated by the state law. The bankrupt law of 1867 has been declared constitutional by the highest judicial authority in this circuit below the supreme court. *In re Beckerford*, 1 Dill. 45. Now this act did not directly prescribe a homestead exemption. It adopted the state laws regulating homesteads. If in one state there was by law no homestead, the bankrupt, under the act of 1867, would get none, and the creditors would be entitled to all his property; while in another state, with a homestead law in force, the bankrupt would get the exemption and the creditors take subject to it. This surely would not be uniformity in the working or operation of the law; nevertheless, such a law would be held uniform in the constitutional sense of the word.

This view enables us, I think, to see clearly the unsoundness of Chief Justice Waite's argument in *Re Eckert*, 10 N. B. R. 5. The burden of the chief justice's argument seems to be that a law of congress which adopts the exemptions under the state laws as they are enforced in the states is uniform because the creditors get just what they are entitled to in *pro rata* distribution. They are entitled to all the property of the bankrupt not exempt from execution by the state law, and this they get in the distribution under a bankrupt law which adopts the state law. This is just, and it is uniform. That it is just, there is no doubt; that it is uniform, may be questioned. It will not do to confound the justice and uniformity of the law in considering this constitutional question.

It follows from Chief Justice Waite's view, that if there was in a state no law giving any exemption, the creditors would take the whole of the bankrupt's property. If the amount

exempted in one state was large, and another small, the sum distributed to the creditors would vary accordingly; but still they would get all they could have reached by the state execution laws. This argument is plausible, and it might be irrefragable if the creditors only were to be considered in judging of the uniformity of a bankrupt law. But if the question of uniformity is to be solved by considering the operation of the law on classes of persons, why are the bankrupts in the several states to be ignored any more than the creditors? Are not the bankrupts to be provided for as well as the creditors? If there is no law in one state giving the bankrupt any homestead exemption at all, while in another state the exemption is trifling in amount, and in still another large, is there any uniformity in the operation of a bankrupt law adopting such state laws, as far as the bankrupt is concerned? If two bankrupts lived in sight of each other across a state line, and one held property under the law worth five or ten thousand dollars and the other nothing, it would be hard to convince them that a bankrupt law working out this result was uniform in its operation. Manifestly, if the bankrupts in the different states are to be considered, the argument of uniformity advanced by the chief justice must be fallacious.

But I think it open to another fatal objection. If the view of the chief justice be correct, it follows that congress could not by direct provision, without reference to state laws, prescribe the conditions and the amount of homestead exemption. For congress would, if it had no reference to state laws, be compelled to prescribe the same conditions and the same amount of exemption for all the states. This is self-evident. Congress could not provide the different conditions and amounts for the different states. What would be the result? The chief justice's theory of uniformity would be overthrown. The creditors in a state with no law giving a homestead exemption would not get in distribution what they are entitled to under the state law. They would be

compelled to suffer a deduction equal to the amount of exemption engrafted by congress upon the bankrupt's estate. And so, whether the homestead exemption under the state laws were great or trifling would make no difference whatever to the creditors; all would be compelled to suffer the same deduction under the law of congress; none would secure under the bankrupt law, in *pro rata* distribution, what they would be entitled to as exempt from execution under their respective state laws. Moreover, all estates, great and small, would be subject to exactly the same amount of exemption. In some cases, the exemption under the congressional law might take the whole estate; in others, it would amount to a mere trifle in proportion to the whole value of the estate. Now, will any one seriously contend that congress might not in a bankrupt law fix the conditions and amount of homestead exemption without reference to state laws? I think not; and yet congress could not do this if the chief justice's theory be correct, that uniformity in a bankrupt law consists in the equal and *pro rata* distribution among creditors of all the bankrupt's property not exempt from execution under the state laws. In the following cases the constitutional question seems to have been decided adversely to Chief Justice Waite's opinion: *Re Beckerford*, 1 Dill. 45; *Re Jordan*, 8 N. B. R. 180; *Re Kean*, id. 367; *Re Smith*, id. 401; *Re Everitt*, 9 N. B. R. 90; *Re Jordan*, 10 N. B. R. 427; *Re Smith*, 2 Woods, 458.

Finally, it is undeniable that the constitutional question involved in the case is a very doubtful one. The utter conflict of opinion and decision in the southern district is the best possible evidence of the doubt and difficulty which surrounded it. On the one hand we have the judgments of Chief Justice Waite, Judge Bond and Judge Bryant, holding the amendment of 1873 to be unconstitutional; on the other, the decisions of numerous judges sustaining the law as constitutional. Now what is the duty of any court with respect to a law of doubtful constitutionality?

Chief Justice Marshall, in the *Dartmouth College Case*, 4 Wheat. 625, speaking for the whole court, said:

"This court can be insensible neither to the magnitude nor delicacy of the question. The validity of a legislative act is to be examined, and the opinion of the highest law tribunal of the state is to be revised, etc. On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has decided that in no doubtful case would it pronounce a legislative act to be unconstitutional."

So spoke the supreme court of the United States, by the mouth of its illustrious chief, concerning the constitutionality of a state statute, and this doctrine has been often reiterated by other courts and jurists. What, then, would it be becoming an inferior federal court to do touching an act of congress, the constitutionality of which is, to say the least, a subject of the gravest doubt? To disregard and set aside *such* an act as an infraction of the constitution would, I think, be in an inferior judge evidence of the most inexcusable presumption.

There is no doubt that congress, in this amendment, passed a sweeping retrospective law. Now, is there anything extraordinary in this, since all the bankrupt laws are in their essence retrospective? The amendment in question interferes with the relation of debtor and creditor, and works injustice to the latter. But the question with us is not the justice, but the uniformity, of the law. All bankrupt laws proceed upon considerations of policy and humanity, rather than strict justice. In this respect they are like statutes of limitations. Congress, seeing that the bankrupt was, with or without his consent, to be stripped of all his property for the benefit of his creditors, provided out of the wreck a shelter for his family against all debts, whether contracted before or after the passage of state homestead laws. Clearly there was no ground of equity upon which an exception could be made in favor of the creditor whose debt was contracted before the acquisition of the homestead in preference

to the creditor whose debt was contracted before the passage of the state homestead law. The first had no merit over the last. In both cases the creditors had contracted with the bankrupts upon the faith of their entire property before any homestead existed. A state exemption law could not be retrospective because it impaired the obligations of contracts. Therefore, a creditor whose debt was contracted before the passage of the state homestead law, equally with a creditor whose claim antedated the purchase of the homestead, was entitled, by both equity and the state law, to satisfaction out of the homestead property. Both classes of creditors standing thus upon the same ground of equity and strict law, what reason is there to assume that congress intended to include one class and exclude the other in passing the retrospective amendment of 1873?

Judgment for defendant.

McCrary, *Circuit Judge*, concurs.

Stout and others *v.* Yaeger Milling Co. and others.

(Eastern District of Missouri. October, 1882.)

1. Corporations — When Directors May Take Security from.— The directors of a solvent corporation may lawfully pledge its securities to secure individual demands of directors and others, due and to accrue, for money loaned to it.
2. Same — Pledge — Delivery.— Where the directors of a corporation placed the company's policies of insurance in the hands of two of its directors without any formal assignment, to secure loans made and to be made by such directors and others to the corporation, *held*, that there was a sufficient delivery to sustain the pledge.
3. Same — Fraudulent Preference.— Where A., a bank which held stock in B., an insolvent corporation, and which was a representative in B.'s board of directors, took security from B. for money due it from B., and for advances to be made by it on B.'s account, and thereafter made large advances on the faith of the security received, *held*, that A. was bound to account to unsecured creditors for their *pro rata* of the proceeds of such securities.

Stout and others v. Yaeger Milling Co. and others.

In equity. Creditors' bill.

The Yaeger Milling Company, of St. Louis, was on the seventeenth day of August, 1880, and for several years prior to that date had been, a corporation engaged in the manufacture of flour, and owned a large mill and wheat warehouse, with elevator machinery, for the prosecution of its business. Both building and the machinery therein were unincumbered. On August 17, 1880, the company's mill and warehouse were both destroyed by fire. Several years prior to the fire, and while the company was solvent, it had placed a number of policies of insurance upon its mill, warehouse, etc., in the hands of two of its directors, which, together with their renewals, it agreed to allow to remain in said directors' hands as pledges to secure loans which had been, and which might thereafter be, made to it by defendants and others to enable it to carry on its business. There was no formal assignment of the policies — they were simply placed in the directors' hands. At the time the fire occurred John Crangle, Henry C. Yaeger, George D. Capen, Arnold Hussmann, H. D. McLean and G. L. Joy were directors of the milling company. They represented stock owned by the Citizens' Insurance Company, the Second National Bank, and the Fourth National Bank, all of which were creditors of the milling company, having loaned it money and accepted as security the above-mentioned pledge of the company's policies of insurance. H. D. McLean was also an individual creditor of the company, and was secured in the same manner as the corporations named. After the milling company's buildings were destroyed by fire, the insurance was collected and distributed among the creditors who had loaned the company money and been secured by the policies. At the time the fire occurred the milling company was doing its banking business through the Fourth National Bank, and as the fire had left the company insolvent the Fourth National refused to pay a number of drafts outstanding against the company, or to pay any checks drawn by it, unless it received security,

not only for future advances, but also for overdrafts which the company then owed it. The milling company then gave it, as security for said overdrafts and future advances, a bill of sale of all its personal property and a mortgage upon its real estate, and the bank thereafter advanced the milling company large sums of money upon the faith of the security received. The plaintiffs in this action are partners. The Yaeger Milling Company having failed to pay for machinery they had sold it, they recovered judgment therefor, but failed to collect it upon execution. They now bring their bill against said company, and its above-named creditors and directors, charging that the directors of the Yaeger Milling Company acted unlawfully in distributing the proceeds of said policies among themselves, and in giving the Fourth National Bank said bill of sale and mortgage.

Overall & Judson, for complainants.

Noble & Orrick, for the Yaeger Milling Company and the Second National Bank.

G. U. Stewart and *Paul Bakewell*, for H. D. McLean.

Paul Bakewell, for Henry C. Yaeger.

Lee & Chandler, for Fourth National Bank and Arnold Hussmann.

TREAT, *District Judge.*—The theory of the bill, as stated by plaintiffs' solicitors, is correct, viz.: That the assets of an insolvent corporation are a trust fund for the benefit of all the creditors, to the extent, at least, that the directors, while it is under their management, cannot appropriate the assets thereof to the payment of demands due to themselves individually, to the exclusion of other creditors and by way of preference to themselves. Starting with that proposition, the next inquiry is concerning securities pledged prior to insolvency to secure the individual demands of directors and

others — demands existing and to accrue for money loaned. The facts as shown by the evidence are not so clear as they ought to be; for it is evident that the enterprise was carried forward upon an understanding that the principal creditors of the former establishment should furnish funds for the new, resting for their security upon the solvency and property of the company in common with all other creditors, and also upon the insurance fund, especially pledged for their advances and money loaned. The principal defendants in this case being creditors when the prior milling establishment was destroyed by fire, chose to embark in the new enterprise, instead of receiving that insurance fund. It is not necessary to comment upon the violation of the national bank law committed by some of the defendants in investing the funds of their banks and engaging in operations not authorized by their charters. This case, however, shows the wisdom of the United States laws on that subject; but it cannot depend upon or be controlled by any such considerations.

Was the pledge of the insurance policies, under the facts and circumstances, a valid and subsisting pledge in favor of the parties in interest, entitling them to appropriate the proceeds thereof, as was done? The cases cited, notably *Casey* v. *Cavaroc*, 96 U. S. 467, turn upon the actual delivery of the pledge for the benefit of the pledgee, so as to avoid secret preferences and pledges to the detriment of other creditors. Where bills of exchange, promissory notes, etc., as in that case, are alleged to have been pledged, there should be some evidence thereof by way of indorsement or assignment, without which the pledgee could not recover thereon. Such bills, notes, etc., are a part of the assets of the pledgor, and subject to the payment of his debts, unless validly transferred. How is it with policies of insurance? They are no part of the security for general creditors except so far as assets therefrom may become assets of the company or pledgor after the contingency happens, viz., loss by fire. If policies are

taken out by creditors for their own benefit, or if, to secure present and prospective creditors, the debtor agrees to take out such policies and does so for the benefit of prescribed creditors, no fraud is practiced on other creditors. It is a matter of daily occurrence that creditors require their debtors to insure their property and assign or pledge the same as security. They are not willing to trust the event of the debtor's solvency if his property is destroyed by fire, and hence exact such security in addition to his personal liability. In the absence of such an arrangement, the creditor may well be supposed to rely upon his debtor's ability to meet his liabilities, irrespective of the contingency by fire. The debtor was not bound to insure, and if he did not, the creditor had no recourse except upon his remaining assets. If he did insure, and the proceeds thereof became a part of his general estate, they became subject to the demands of his creditors equally with other assets. But if the insurance was made, not for the general benefit, but solely or primarily for the security of a specified class of creditors, by agreement with them, why should not the transaction be upheld; and by what legal or equitable right could the unsecured creditors claim that they should share in such securities?

The question, however, in this case is as to the pledge of the policies and their renewals for the purposes alleged. There was no formal assignment, and no consent of the insurance companies to such assignments. The original policies were placed in the hands of Nulsen for the benefit of specified creditors, and as changes occurred the renewals were placed in the hands of Capen and McLean, that they might cause those securities to be kept alive for the purpose of the original pledge. When the fire occurred and the amount of losses was collected, the sums so collected would necessarily have to be paid over to the pledgors, to the amount of their demands secured. The fact that the creditors were directors, and the company, pledgor and directors were the trustees for the benefit of said creditors, cannot

affect the good faith of the transaction, if the agreement to pledge existed at the time of the advances, and the creditors were within the terms of the pledge. Other or general creditors who had not taken such securities have no ground of complaint. There was no preference, within the admitted rule, but merely an enforcement of securities. Hence the allotment of the policies of insurance as pledged does not fall within the inhibited act. There is a difficulty as to the bill of sale and mortgage made after the fire to the Fourth National Bank. If its prior advances fell within the terms of the pledge, it had a right to its *pro rata* compensation from the proceeds of the insurance; but it seems that it did not rely upon that fund. It took for overdrafts and new advances, after the fire, a bill of sale and mortgage for these demands, which, as the company was insolvent, the directors had no legal authority to grant, that bank being a stockholder and representative in the directory. Hence the bank must account to the plaintiffs for their *pro rata* of the proceeds of such bill of sale, and of the mortgage which it received.

The decree will be that said Fourth National Bank be held to account for and pay over to the plaintiffs their *pro rata* of the securities acquired by said bank after the fire occurred,—the bill being retained as to other parties to abide the result of said preference to said bank. The amount for which said Fourth National Bank is liable under this ruling being undetermined, an order will be entered, unless the parties agree to said amount within ten days herefrom, to refer the same to Thomas G. C. Davis as special master, to hear testimony and report to the court said amount.

McCabe *v.* Illinois Cent. R. Co.

(Northern District of Iowa. April, 1882.)

1. Foreign Corporations — Non-Residents — Statute of Limitations. — A foreign corporation that by the laws of a state within which it comes on business can sue and be sued, is not a *non-resident* in the sense that would prevent it from setting up the statute of limitations as a defense in an action against it; and section 2533 of the code of Iowa, that provides that "the time during which a defendant is a non-resident of the state shall not be included in computing the period of limitation," has no reference to such a case.

This is an action for personal injuries. The defendant is an Illinois corporation. It appears that the cause of action accrued more than two years before the commencement of the suit. The defendant pleads the Iowa statute of limitations, which provides that "actions founded on injuries to the person or reputation, whether based on contract or not, or for a statute penalty, shall be commenced within two years after their causes accrue." This provision is qualified by section 2529, as follows:

"The time during which a defendant is a non-resident of the state shall not be included in computing any of the periods of limitation above described."

Love, *District Judge.*— The plaintiff contends that a foreign corporation cannot in any case plead the statute of limitations in this state because it is a non-resident of the state. It is an artificial person existing only by the law of its creation. It has no existence and can have no existence outside of the state by whose laws it has been created. It cannot change its abode; it is incapable of emigration; its fixed residence is in the state of its creation. It may have agents in other states; it may do business in them; it may, by the laws of such states, sue and be sued therein; but it can have but one residence, which must be and is in the state to which it owes its existence.

This is the plaintiff's argument, but does it not proceed upon an erroneous assumption? Can it be truly said that a corporation has really a residence anywhere? It is said that a corporation is an artificial person, and by a natural transition of thought a place of residence is ascribed to this artificial person. But is it not by a mere fiction of law that personality, and residence in place, are ascribed to a corporation? What is a corporation? Would it not be more accurate to call it an artificial being — a mere legal entity — than an artificial person? Doubtless a corporation is a legal being and has a legal existence in the state of its creation, but it is difficult to conceive the idea of a residence in place for it. If you search for a corporation, how will you find it and do any manner of business with it? You will find and know the corporation by and through its agents; through them alone will you be able to do any business whatever with the corporation. The agents of the corporation can be seen; it cannot. They can be served with process; it cannot. If you wish to sue the corporation, you must make service of legal process upon the agents of the corporate body. These agents have residences and can be found, but they are not the corporation. The president and directors are not the corporation. They may all die and none be elected to take their places; yet the corporation still lives. The president and directors are merely the agents of the corporate body. Neither are the stockholders the corporation. They can as such neither sue nor be sued on account of the corporation. They are not even its agents to make contracts, receive notice, or accept legal service. The corporation is a something — a legal entity — an artificial being or person — entirely distinct from both the stockholders and president and directors. Now, the stockholders and the president and directors have a residence, but the ideal, invisible, legal being called the corporation has none. Indeed, the legal existence of a corporation may be in one state or place, and the residence of every stockholder, as well as the presi-

dent and directors, in another, unless the law creating the corporation requires their residence in the state or place of its creation. Thus, with respect to a corporation created by the laws of New York or of Iowa, every stockholder and the president and directors might reside in New Jersey or Illinois.

Since, then, a corporation cannot be said, except in legal fiction, to have residence anywhere, non-residence cannot, in a strict sense, be ascribed to it. In construing the word "non-residence," therefore, as used in section 2533, we must consider, not so much what may or may not be the "residence" of a corporation in the abstract as what the legislature intended by the use of the word "non-resident" in the connection in which we find it. We must not stick in the bark; not confine our view solely to the meaning of the word "non-resident," but take in the whole scope of this legislation. We must consider the matter, not in the abstract, but in the concrete.

Seeing, then, that corporations cannot be said to have literally any residence in a place, and that they cannot be known and dealt with and sued except by and through their agents, and seeing that the legislature provided in section 2611 of the same code that foreign as well as other corporations may be sued in this state by service on the agents whom they have appointed to carry on their business here, can we doubt that the legislature intended that the presence of the agent in this state subject to process should be deemed, as to the legal purposes of a suit, with all its incidents and defenses, the presence of the corporation? Can we suppose the legislature intended that a foreign corporation might be sued in this state in the way prescribed, and yet deprived of one of the essential rights accorded to every other defendant?

A strict and literal interpretation of section 2533 would, as against foreign corporations, rob it of all reason; for the sole reason for providing that the "time during which the

defendant is a non-resident of the state shall not be included in computing any of the periods of limitation" is to save the rights of the plaintiff, where, by reason of the defendant's absence, the plaintiff cannot get service upon him. But the facilities for suing foreign corporations doing business in Iowa are greater than those which the law furnishes against individuals residing here. A foreign corporation may be sued in any county where its agent may be found carrying on its business, and it cannot do business without agents. An individual must be sued in the county of his residence. To say, therefore, that a plaintiff may sue a foreign corporation anywhere in the state, and at any time after the cause of action accrues, and yet that the corporation is to be deemed a non-resident, and may not, therefore, plead the statute of limitations, is to make the statute purely arbitrary. It is equivalent to saying that the corporation shall be deemed resident, or at least present, for the purpose of being sued, but not resident with respect to this defense of the suit. This construction of the statute, while wholly unnecessary to protect the plaintiff's rights, would work infinite detriment to foreign corporations doing business in Iowa; for with this construction they might be sued upon stale claims resting in parol, or for personal injuries ten or twenty years after the cause of action accrued, and long after the witnesses of such transactions have passed away. Thus would the very policy and purpose of the limitation law be subverted by a too literal interpretation of one of its own provisions. The legislature could surely not have intended that the statute of limitations should be so construed as to annul and defeat the very purpose for which it was enacted.

There is nothing in the decisions of the supreme court of the United States, when properly understood, to impair our conviction of the soundness of the views we have expressed. That court has often laid down the doctrine that a corporation is a legal entity, having no existence beyond the limits

of the state of its creation; that it cannot change its abode; that it cannot migrate from one state to another; that it cannot at will transfer itself as a legal being or person from one jurisdiction to another, etc. This doctrine is undoubtedly entirely sound, but what does it decide as to the mere residence of the corporation, and, more especially, as to the meaning of the word "non-resident," as used in the Iowa statute? Legal existence and residence are by no means the same thing. Indeed, while the artificial being called a corporation has a clearly-defined legal existence, who can safely affirm that, considered in the abstract and apart from its agents, it has any residence whatever? This abstract being, this incorporeal legal entity, cannot, for manifest reasons, migrate from one state to another. Since it cannot transfer the law of one state to another state, how can it, being as it is a mere creation of the law of the state to which it belongs, exist in any state other than the one in which the law of its life prevails? The law of the state creating a corporation is the breath of its life. Such I understand to be the doctrine announced in the cases cited below, and it has generally been laid down with reference to the citizenship of corporations. The supreme court have, we know, by a legal fiction, endowed corporations with citizenship in the states by which they are created, and they cannot transfer this citizenship from a state where the law alone gives them life to a state in which no law exists to keep them alive. As a natural person passing from vital air into vacuum dies, so a corporation transferred from its state of life-giving law to a place where it has no law ceases to live.

But does it follow from this doctrine that a corporation may not have a legal residence, through its agents, in a state other than the one of its creation, with the assent of the state in which it is so present, for business or other purposes? May it not, when so present, make contracts, commit torts, sue and be sued? And if so, why may it not be deemed to have a legal residence or presence, if you will,

so far as the statute of limitations is concerned? Is it a strained construction of the word "residence," as used in our statute, which leads to a conclusion at once so just and rational? Indeed, the supreme court of the United States, in *Ex parte Schollenberger*, compelled the circuit court of the United States for Pennsylvania, by *mandamus*, to take jurisdiction of certain causes against a foreign corporation, commenced by a citizen of Pennsylvania and dismissed by the circuit court for want of jurisdiction. The ground of this decision was that the foreign corporation was carrying on business in Pennsylvania, and had agents there subject to legal process. 96 U. S. 369, 376.

The chief justice, speaking for the court, says:

"The language of this court in *Railroad Co.* v. *Harris*, 12 Wall. 65, through Mr. Justice Swayne, is: 'It [a corporation] cannot migrate, but it may exercise its authority in a foreign territory upon such conditions as may be prescribed by the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented, and will be bound accordingly.'"

See *Bank of Augusta* v. *Earle*, 13 Pet. 588; *Ohio & Miss. R. Co.* v. *Wheeler*, 1 Black, 295; *Runyan* v. *Coster's Lessee*, 14 Pet. 129; *Louisville, C. & C. R. Co.* v. *Letson*, 2 How. 497; *Covington Drawbridge Co.* v. *Shepherd*, 20 How. 227, 233; *Paul* v. *Virginia*, 8 Wall. 168, 181.

We repeat that the true question is not what is to be deemed the residence of a corporation in the abstract, but rather in what sense did the legislature of Iowa use the word "non-resident" in the section under consideration? This question is by no means answered, as counsel seem to suppose, by the decision of the supreme court of the United States in *Tioga R. Co.* v. *Blossburg & C. R. Co.* 20 Wall. 137. The court in this case simply follows the courts of the state of New York in expounding the statute law of that state, which decisions, it may be conceded, sustain the plaintiff's position in the present case. Far, however, from ex-

pressing any approval of the decisions of the New York courts, Mr. Justice Bradley, in delivering the opinion, intimates that the supreme court of the United States considered them on principle unsound, and Mr. Justice Miller, in his dissenting opinion, emphatically condemns the doctrine of the New York courts. Mr. Justice Bradley, delivering the opinion, says:

"The courts of New York have decided that a foreign corporation cannot avail itself of the statute of limitations of that state. These decisions upon construction of the statute are binding upon us, whatever we may think of their unsoundness upon general principles."

The case in the supreme court of the United States most resembling the present case, in which that court, not being bound by any state decision, gives its independent judgment, was the *Ex. Co.* v. *Ware*, 20 Wall. 543. The statute of the state of Nebraska (though not fully given in the report) provides that the time of the defendant's absence from the state is not to be computed, but in case of a foreign corporation, if it has a managing agent in the state, service of the suit may be made upon such managing agent. This is substantially the same as our legislation on the same subject.

The circuit court of the district of Nebraska instructed the jury as follows:

"If you find that the defendant had a managing agent within the state at the time of the loss, then the statute began to run from that time, and if it had such agent in the state for the next five years after the loss, then this action is barred, but otherwise it is not. In other words, to bar this action the plaintiff must have been able, for five years before the suit was brought, to have sued the defendant in this state, and compelled it to answer the suit by a service upon a managing agent therein."

The supreme court of the United States affirmed the correctness of this instruction, saying they could see no error in the charge, and this is in accord with the Iowa and Illinois

adjudications. The decisions of the state courts upon the questions under consideration are in conflict. Indeed, upon what question of the least doubt are they not in conflict? The decisions of the courts of New York are, as we have seen, opposed to the view we have taken above. Those of Illinois, on the contrary, fully sustain our position. See *Bank of N. A.* v. *C., D. & V. R. Co.* 82 Ill. 495; *Pennsylvania Co.* v. *Sloan*, 1 Bradw. 64; *Bristol* v. *Chicago & A. R. Co.* 15 Ill. 436.

But it is, of course, to the decisions of the supreme court of Iowa that we must chiefly look in expounding the statutes of this state; and if there was any decision of that tribunal directly upon the question before us, it would be our duty to follow it. There is, perhaps, no such decision to guide us, but the whole tenor and scope of the state supreme court decisions favor strongly the conclusion at which we have arrived. Thus the supreme court of Iowa, in *Baldwin* v. *M. & M. R. Co.* 5 Iowa, 519, cite with approval the language and doctrine of *Bristol* v. *C. & A. R. R. Co.* 15 Ill. 438, as follows:

"The residence of a corporation, if it can be said to have a residence, is necessarily where it exercises corporate functions. It dwells in the place where its business is done. It is located where its franchises are exercised. It is present where it is engaged in the prosecution of the corporate enterprise. This corporation has a legal residence in any county in which it operates the road or exercises corporate powers and privileges. In legal contemplation, it resides in the counties through which its road passes, and in which it transacts its business."

Again, in *Richardson* v. *B. & M. R. R. Co.* 8 Iowa, 263, the court say:

"The material question is whether the defendants had a residence in Henry county. And this must be regarded as settled by the case of *Baldwin* v. *M. & M. R. Co.* 5 Iowa, 518. It was there held that a corporation like a railway

company resides in counties through which the road passes and in which it transacts its business; that it has a legal residence where it exercises corporate powers and privileges."

It is no answer to this to say that these cases relate to Iowa corporations, since the question is, what is the true interpretation of the words "residence" and "non-residence" in our legislation when applied to railway corporations? Our legislation has distinctly recognized the right of foreign railway corporations to run and operate their roads and exercise their franchises in Iowa, and this surely brings them within the doctrine as to what constitutes legal residence laid down in the cases cited. See, also, *Penley* v. *Waterhouse*, 1 Iowa, 498, and *Savage* v. *Scott*, 45 Iowa, 132. These cases, though dissimilar in their facts to the present case, and therefore not directly in point, do, nevertheless, favor distinctly the doctrine that the true test of legal residence is the fact that the defendant is within the jurisdiction and subject to legal process.

In *Cobb* v. *Ill. Cent. R'y Co.* 38 Iowa, 608, the defendant pleaded the statute of limitations and the court sustained the plea, but it is said that the "question now under consideration was not raised, considered or decided." This may be true as far as counsel were concerned in that case, but it would seem that when the question was directly made by the plea of the statute, the court must have passed upon it.

Shiras, Vanduzee & Henderson, for plaintiff.

Griffith & Knight, for defendants.

STINSON *v.* HAWKINS.

(Eastern District of Missouri. October, 1882.)

1. EVIDENCE — SHERIFF'S RETURN.— Where A. brings suit against B. by attachment, and the sheriff executing the writ seizes property belonging to C., the sheriff's return is conclusive as to the fact of seizure and the articles seized, in a suit by C. against A. for damages.

2. FRAUD — CONVEYANCES TO HINDER AND DELAY CREDITORS.— A mortgage executed to hinder and delay the mortgagor's creditors is void as to such creditors, even when for full value, if the mortgagee is aware of the fraudulent intent.

Motion for a new trial.

The plaintiff in his petition states that the defendant, on or about August 23, 1880, wrongfully, without leave, and with force and arms, attached, levied upon, seized and took away certain personal property therein described, belonging to the plaintiff, all of the value of $4,000, and converted and disposed of the same to his, the defendant's, own use; for which he asked damages. The defendant, in his answer, states that at or about the date mentioned in the petition he began a suit by attachment against one George King, in the circuit court of the county in which said property was situated; that the attachment was executed by the sheriff of said county, by seizing and taking into his possession the property mentioned in said petition; that thereupon the plaintiff in this suit filed an interplea in said attachment suit, claiming that said property belonged to him by virtue and force of a certain mortgage from said King to him, to which interplea the defendant herein filed a denial; that said cause was thereupon removed to this court at the instance of plaintiff, so far as it involved the issues upon said interplea; that at the trial of the cause in the state court the case turned upon the question of whether or not the mortgage under which the plaintiff claims was given to hinder and delay creditors, and that the verdict and judgment was for the plaintiff therein; that the branch of said cause removed to this court was thereafter remanded to the state court, and plaintiff's interplea was then dismissed by him; wherefore defendant claims plaintiff is estopped from reasserting title to said property under said mortgage.

TREAT, *District Judge (charging jury).*— The propositions for you to consider are very few. It is admitted, or not

controverted to any extent, that the mortgage in question was executed as it is said to have been, and that there was a seizure and levy under attachment of certain property described in the mortgage, and set out or claimed in the plaintiff's petition. If you find for the plaintiff, in estimating his damages you will have to ascertain the value of the property seized, and, so far as the growing corn is concerned, its value as it then was, looking over all the testimony that has been presented to enable you to ascertain what the real value of that corn was at the time. You are permitted, if you find for the plaintiff in this case, after you have ascertained that sum, to add interest thereto from the date of the seizure to the present time at the rate of six per cent. per annum.

But the main proposition involving the right of the plaintiff to recover depends upon this inquiry: Was this a *bona fide* mortgage; that is, made in good faith, to secure a sum due to this plaintiff from Mr. King? Under the law of Missouri a debtor can sell or mortgage his property to any one between whom and himself there are transactions justifying the act; in other words, he may prefer one creditor in that way and leave his other creditors unsecured. So far as the testimony that has been offered to you is concerned, you must remember, gentlemen, that you are the sole judge of the weight to be given to it; that is your exclusive province; as it is also your exclusive province to determine the facts in the light of the testimony offered. Fraud is not to be presumed; it has to be proved; and it remains for you to determine whether the testimony offered by the defendant in this case has satisfied you that this was a fraudulent mortgage. In the eye of the law a mortgage given to secure a pretended debt — a debt not existing, whereby other creditors of the party giving the mortgage are hindered and delayed — is necessarily fraudulent.

The question, then, narrows itself down to this inquiry: Did Mr. King honestly owe Mr. Stinson, the plaintiff, the

sum of money represented by the mortgage, or anything near that? In other words, it is not for the jury to carefully compute the amount within a few dollars or cents. If the parties had an accounting between themselves, and a lawful rate of interest was allowed, the debtor had a right to allow that rate of interest. But did Mr. King owe this sum of money represented by the large note, even including interest? or was that note made up of sums largely in excess of what actually is due from Mr. King to Mr. Stinson? If it was made up of sums largely in excess of the debt due — or, in other words, if it was given for an amount largely in excess of what actually was due — the mortgage is, in law, fraudulent and void. Gentlemen, take the case.

The jury found a verdict for the plaintiff in the sum of $900, with interest from August 23, 1880.

The defendant moved the court to set aside the verdict and grant a new trial, because, among other reasons, the verdict of the jury was contrary to the weight of evidence, because the court admitted improper testimony, and because the court gave the jury erroneous instructions.

David Murphy, for plaintiff.

Vallaint & Thoroughman, for defendant.

TREAT, *District Judge.*— The first point presented is as to the conclusiveness of the sheriff's return against this defendant, who was plaintiff in the attachment suit. That suit was instituted by this defendant against King, and the return states what property was seized thereunder. The defendant's counsel in this case urged that it was only *prima facie* and not conclusive; and that as this court on the trial held otherwise, error was committed. Authorities are cited for defendant: 59 Mo. 80; Crocker, Sheriffs, § 45. The foot-notes to Crocker refer to several cases, and more especially to 2 Cow. & H. Notes, 795 *et seq.;* to Phil. Ev.— in which all the cases therein decided are briefly stated.

Without reviewing the many cases in which defendant, on the relation of parties to the controversy, claims that the official return is to be considered *prima facie* or conclusive, this court can find no well-considered case, nor can it find any sound reason, for other than the ruling made at the trial, viz.: That, as between the parties to this suit, the sheriff's return was conclusive against this defendant as to the fact of seizure and articles seized. True, the plaintiff was not a party to the attachment suit, and was not concluded by what was done therein, but the defendant was a party thereto, and the moving party. He caused the seizure, obtained the judgment and reaped the fruits thereof. The suit now before this court is one in which the plaintiff alleges that the property seized and sold under judicial process in that attachment case against King, at the instance of this defendant, who was plaintiff in that attachment case, was not King's property, but the plaintiff's. The judicial record in the attachment case shows what was done adverse to the alleged rights of Stinson, for which Hawkins is liable. Hawkins was not only the moving party in that case, but through judicial sale, as the record discloses, received the benefits thereof. Can he dispute the record to which he was a party in this collateral proceeding? True, the plaintiff here, not being a party thereto, would not be concluded thereby, but the defendant is. Hence, no error is found as to that point.

The second ground of error is that the court's charge was too narrow, and must have misled the jury. As to this, the defendant is correct, in the light of decisions quoted. A sale of property, even for full value, in order to hinder or delay creditors, both vendor and vendee knowing the fraudulent purpose, cannot be upheld. Does a different rule obtain when a mortgage is given, especially for an antecedent debt, and particularly one of long standing? The circumstances of this case called for fuller instructions than were given; but as the line of evidence and the special contention was, by defendant, that plaintiff's mortgage was largely in excess

of any sum justly his due from King, and that the jury should so find, the court pointed the inquiry sharply in that direction, and other elements were omitted.

As the case will again have to go to a jury, it is not proper to analyze or discuss the testimony. A party giving and a party receiving a preference can ordinarily uphold the transaction; but the *good faith* thereof is still open to investigation. Was the alleged preference merely to secure a valid, subsisting demand, and made in good faith, or was it given, not to secure the mortgagee, but to cover up the mortgagor's property, so that honest creditors could not reach the same, and the mortgagor practically or actually remain in the possession and enjoyment thereof? In other words, was the mortgage given for a fraudulent purpose, and assailable for fraud, despite the alleged consideration?

The motion for a new trial is sustained.

MATHER and others *v.* NESBIT.

(District of Minnesota. October, 1882.)

1. STATE INSOLVENCY LAWS — CONSTITUTIONALITY. — In the absence of congressional action enacting a bankrupt law, states may pass insolvent laws; but such laws have no extraterritorial operation, and do not apply to contracts made within the state between its citizens and citizens of other states. Such laws do not necessarily impair the obligation of contracts within the inhibition of the constitution of the United States.
2. SAME. — The provision of an insolvent law which does not grant a discharge of the debtor on surrender of all his property to an assignee or a receiver, but merely gives a priority to creditors who will release the debtor over those who stand back and do not accept the conditions under which his property passes to the assignee or the receiver, and who alone can receive dividends from the estate, is not in conflict with the constitution of the state or of the United States.
3. SAME — ATTACHMENT — DISSOLUTION OF. — Section 915 of the Revised Statutes adopts the remedy by attachment provided by state laws;

and when a contingency arises whereby the attachment would be dissolved under provisions of a state law, the attachment will be deemed dissolved in a federal court, as provided in section 933 of the Revised Statutes.

In this case, on application of plaintiffs, a writ of attachment issued, and the property of defendant was seized by the United States marshal. Subsequently, the defendant, under the insolvency act of Minnesota (chapter 148, Laws 1881), made an assignment for the distribution of his property under said law. It is claimed that the attachment is dissolved by virtue of said assignment, and application is made to the court for an order that the United States marshal turn the property over to the assignee. Plaintiff opposes said application, and the motion is heard by the court.

Frackelton & Warner, for the motion.

Woods & Hahn, contra.

NELSON, *District Judge.*— It is urged that the insolvency law of the state of Minnesota (Gen. Laws 1881, ch. 148) impairs the obligation of contracts and is unconstitutional, and that each and every part of the same is void; also, that the process of attachment issued out of the federal court, and all rights and incidents thereto attaching, cannot be affected by this law. The following principles are well settled: (1) That in the absence of congressional action enacting a bankrupt law, the states may pass insolvent laws, and such laws do not necessarily impair the obligation of contracts. (2) Such insolvent laws have no extraterritorial operation upon the contracts of other states, and do not apply to contracts made within the state between a citizen of the state and citizens of other states. The rules as above stated have been frequently announced by the supreme court of the United States. 12 Wheat. 213; 6 Pet. 643; 5 How. 295; 1 Wall. 225. See 1 Dill. 515; *Bedell* v. *Soruton*, 26 Alb. Law J. 348.

The insolvent law of Minnesota does not grant a discharge of the debtor on surrender of all his property to an assignee or receiver. The courts are open to any creditor who is not disposed to become a party to the insolvency proceedings, and unless a creditor gives a release to his insolvent debtor, he can bring suit and obtain judgment; but a priority is given to creditors who will release the debtor over those who stand back and do not accept the conditions under which the insolvent's property passes to the assignee or the receiver, and they only can receive dividends from the estate. This provision does not conflict with the constitution of the state of Minnesota or United States, for such right of priority is a personal privilege and forms no part of the contract. I do not care to discuss this point, and it is not necessary.

The law certainly does not impair the obligation of plaintiff's contract by giving this priority. True, in terms it dissolves the process of attachment under which the debtor's property was seized, but the federal court can issue such a writ only when the state law permits it. Section 915, U. S. Rev. St., adopts the remedy by attachment which is now provided by the law of the state of Minnesota, and it is by this recognition of the process that the writ issued in this case.

Have the insolvency proceedings dissolved this attachment? The plaintiffs say the writ is not affected by this act. The first section of the insolvency act authorizes an assignment to be made by a debtor whose property has been seized by attachment, and such assignment is an initiatory step to proceeding under the act. When an assignment is made conforming to this section and perfected, the attachment by the terms of the act is dissolved, and the title to the property vests in trust in the assignee. If the attachment had issued from the state court, it would be dissolved. The plaintiff concedes it, and it is clear that a contingency has arisen which is provided for in section 933, Rev. St. This section enacts that:

"An attachment of property upon process instituted in any

court of the United States to satisfy such judgment as may be recovered by the plaintiff therein . . . shall be dissolved when any contingency occurs by which, according to the laws of the state where said court is held, such attachment would be dissolved upon like process instituted in the courts of said state; provided, that nothing herein contained shall interfere with any priority of the United States in the payment of debts."

This law is explicit, and puts attachments in the state and federal courts on the same footing. It follows, therefore, that the attachment in this case is dissolved, and the marshal is ordered to turn over the property to the assignee on payment of necessary expenses and legal fees.

WACKERLE *v.* MUTUAL LIFE INS. CO.

(Eastern District of Missouri. October, 1882.)

1. LIFE INSURANCE — BURDEN OF PROOF. — In an action by a wife on the policy of insurance taken out on her husband's life, the burden of proof is on the plaintiff to prove the death of her husband and her right to recover.
2. IDENTITY OF PERSON — PROVINCE OF JURY. — Where a witness was called who represented himself to be the husband of the plaintiff, while the plaintiff denied that he was her husband, and the witness was ignorant of many circumstances in the life of the person whom he personated, and the testimony adduced in support of his identity was conflicting, it is the peculiar province of the jury to decide the question of identity from all the evidence adduced.
3. SAME — WEIGHT OF EVIDENCE. — Where there is a vast conflict of testimony, in which there is a question of identity to be established, it is for the jury first to consider which witnesses had the best opportunity and were most likely to know the facts, and second, to give to those witnesses whose long acquaintance and special opportunities were such as to enable them to carry in their recollection the identity of the particular party, greater weight than those who only casually knew the party.
4. SAME — CONCLUSIVENESS OF VERDICT. — Where the court alluded to and commented on the evidence sharply against plaintiff's claim so

far as identity depended on the exhumed skeleton of the party alleged to have been her husband, and the jury reached the conclusion that it was the skeleton of her husband, killed in a railroad accident as alleged, and that the witness representing himself to be her husband was not what he pretended, which was their exclusive province, the court will not interfere with the verdict.

This was a suit to recover money alleged to be due by the terms of a policy of insurance upon the life of William Wackerle, deceased, issued by defendant for the benefit of plaintiff, his wife; and also to recover a premium paid by plaintiff to defendant by mistake, after the assured's death. The defendant in its answer denied that the terms of the policy had been complied with by the plaintiff, and denied also that the assured was dead. The case was tried before a jury. The testimony was very conflicting. The plaintiff introduced evidence tending to prove that her husband, the assured, had been killed by a railroad accident, and that in ignorance of his death she had subsequently paid a premium to defendant. The defendant thereupon placed a witness upon the stand who swore that he was William Wackerle, the plaintiff's husband, whose life had been insured by the policy sued upon. It was also shown that he had in the character of William Wackerle drawn several thousand dollars from the United States treasury in pensions. But this witness proved upon examination to be ignorant of a number of important events in the life of the real William Wackerle, such as his wife's having given birth to a child on the night she and her husband arrived from Sacramento, California, at Quincy, Illinois, and the fact that William Wackerle was in Cincinnati in the year 1869 and at another time in Marshall, Texas. The witness was also ignorant as to the age, sex, place of birth or burial of five out of eight children he said the plaintiff had borne to him.

The evidence was also conflicting as to other points, which need not be here detailed.

TREAT, *District Judge (charging jury).*— You have been detained here for a considerable length of time on a case somewhat peculiar in its character, the solution of which must depend almost entirely on you; in other words, the main question at issue is a simple question of fact, of which jurors are by law the sole judges. This is a suit on a policy issued January 24, 1867, in which the party whose life was insured is described as a resident of Milwaukee, and a laborer. The policy was issued on the life of the husband for the benefit of the wife. She contends that her husband was killed December 25, 1872, in Louisiana, near Shreveport, and on that hypothesis she offered to the company proof of loss — that is, the required proof under the policy — that he was dead on February 4, 1873. On January 24, 1873, she paid the premium, — $131.44,— also on the hypothesis that he was not then dead, or, if dead, the fact of his death was unknown to her; so that, if the result of your verdict is that the plaintiff in this case is entitled to recover, she will recover the $4,000 insurance, with interest from March 6, 1873. The loss was payable six months after proof was made, and that, by my computation, would bring it to March 6, 1873; and as to the payment of $131.44, of course no interest should run against that until the company was informed or notified that death had previously occurred.

For the purposes of this case, if you find for the plaintiff, you will compute interest on the $4,000 and on the $131.44 from March 6, 1873. Now, the question of fact is a very difficult one, in which you can receive little or no aid from the court; but it may not be improper for the court to direct your attention in a very general way to such matters as may aid you in the analysis of the testimony. Bear in mind that the loss is alleged to have occurred on the twenty-fifth of December, 1872. Bear in mind, also, the circumstances and facts connected with the death of the particular person there, and whether the facts substantiate his identity — not

in name only, but in person — as the husband of the plaintiff here. If my memory serves me correctly with regard to this testimony, there was something in the nature of an epidemic at that time at Shreveport, whereby a great many persons dying were buried in the Potter's field, and among them persons killed on the railroad. Now, what was the nature of that accident? If it be, as some witness suggested who was familiar with the accident, that his leg was crushed just above the knee, you will have then an *indicia* or mark to guide you in the further progress of the case; and also this broken tooth, on the other hand. It appears from the testimony of plaintiff that this tooth, about which there seems to be no special difficulty, seems to have been lost and disappeared from the husband of this plaintiff prior to that period of time.

It seems this body was exhumed twice; the first time with reference to the suit then pending and long after the death. The body could be recognized only by such marks as would not be likely to disappear after interment for a long period of time. The broken tooth and fragment of a garment seemed to be the main reliances on the one hand for identification; and on the other hand, on the second exhumation, an unbroken leg and no bones crushed at all. Hence, as to the purposes of identity there, and as to what occurred when the bodies were exhumed, the question arises, was this the man killed by the railroad? You will have to determine with regard to these matters, bearing in mind this doctor's statement,— Dr. Moore, I think, is the man,— that in exhuming the body he found the leg bones entire. Hence, you will encounter at the very outset that difficulty. If, however, you think that the weight of testimony with regard to that matter is with the plaintiff,— for it is for the plaintiff always to prove her case, the burden being on the plaintiff in all cases,— if you reach the conclusion that the person killed was the person exhumed, the next step in the inquiry is, was the person killed and exhumed the husband of this lady? Now you

will look very carefully into all the incidents connected with the affairs down there to ascertain that matter, in connection, of course, with what other testimony has been offered. The lady herself testifies that the person produced here upon the stand, claiming to be her husband, is not, while he, on the other hand, testifies that he is her husband.

Now, there is a vast deal of testimony presented here from various portions of the country. Some witnesses here say that they knew William Wackerle, who was the husband, in the old country; that they were boys together, and they renewed their acquaintance in this country. There were others who did not know him in the old country, but knew the family, both this lady and her husband, up in Carver county, where, it may be presumed, and I think the testimony shows, about seventy families resided at that time, and nearly every one living there a pioneer life knew every one else. Then you have the testimony of those two persons in California. You have, on the other hand, the testimony of witnesses in Carver county ignoring or negativing, according to the statements of those witnesses, the alleged fact that this William Wackerle was the husband. You have this testimony from Quincy — Dr. Bassett and those other gentlemen who knew him there. Now, in such a vast conflict of testimony, in which there is a question of personal identity to be established, it would seem that the mode of solving it would be, first (supposing all parties testifying equally upright and desirous of only telling strictly the truth), what witnesses had the best opportunity and were most likely to know the facts, and giving to such persons whose long acquaintance and whose special opportunities were such as to enable them to carry in their recollection distinctly the identity of a particular party, greater weight than those who only casually knew him, and who consequently might not, from having nothing particular to impress upon their memory the appearance of the man, remember him as distinctly, and giving to the latter less weight. Begin at the occurrence in Louisiana first; ascertain whether

the person killed was the husband of this lady; next, whether the person exhumed was the person killed; then examine the testimony that has been produced here from various persons, who allege that they know this is the husband — some testifying that he is the husband, and some saying that they do not recognize him, though they did know the husband when he lived in Carver county.

Now, the court cannot aid you any further, gentlemen, in regard to this matter. I can only direct your attention to these salient matters, and you alone can solve the questions involved.

You will have to take the case, gentlemen, as it is, to ascertain whether the husband of this lady died, as contended, from a railroad accident on the twenty-fifth of December, 1873, or whether, on the other hand, he was not then killed, but is still alive. That is all there is in the case as far as the court is concerned.

The jury retired, and, after a not very long conference, brought in a verdict in favor of plaintiff for $6,300 on the policy for $4,000, including interest, and for $206.99 on the payment of premium by the plaintiff after the death of her husband, including interest. There was subsequently a remittance entered by plaintiff for $300, and the court rendered judgment for the remainder, $6,206.99.

Whereupon the defendant moved the court to set aside the verdict and judgment, and grant a new trial of the case for the following reasons, to wit:

"(1) Because the verdict is against law; (2) because the verdict is against the evidence; (3) because the verdict is against the weight of evidence; (4) because the verdict is so repugnant to the evidence in the case as to indicate prejudice and passion in the jury against the defendant, and of mere favor towards the plaintiff; (5) because there was no evidence in the cause of the death of the insured, William

Wackerle; (6) the court erred in charging the jury that they were sole judges of the issues in the cause."

A. R. Taylor, for plaintiff.

Glover & Shipley, for defendant.

TREAT, *District Judge.*— A full examination has been made of the evidence, which was one peculiarly for a jury. It was, on both sides, full of doubts, inconsistencies and contradictions. Turn as we may in the analysis of the evidence, strange and irreconcilable aspects are presented. The first point to be established by plaintiff was the death of her husband. That rested on the testimony of several witnesses concerning the railroad accident and the identity of the person killed thereby.

The evidence of the plaintiff and others as to the skeleton exhumed some four or more years after such killing establishes to the satisfaction of the court that the exhumed skeleton was not that of the man killed, supposed to be William Wackerle, on December 25, 1872. The court directed the attention of the jury especially to that fact. Not that it was conclusive, but because it tended to show what weight should be given to other testimony. It may be that the exhumed skeleton was not that of William Wackerle, and hence the accuracy of plaintiff's testimony became questionable. Yet there was other evidence as to the death of the party killed, independent of the exhumation in 1877. It was therefore for the jury to decide whether, despite the mistakes as to the identity of the skeleton, William Wackerle was killed as alleged.

The case as presented by the evidence was remarkable in many other aspects, concerning which it is useless to comment. There are several depositions wanting which the court has been anxious to read and analyze, but by some accident they have disappeared. Hence the court has to rely on its memory as to their contents, and if a new trial is

granted, the plaintiff, after a long lapse of time, [cannot be required] to supply the same.

So far as the court was justified in alluding to or commenting on the evidence, it pointed in its charge sharply against the plaintiff's claim, so far as identity depended on the exhumed skeleton. Still, the jury reached the conclusion that the plaintiff's husband was killed in 1872, as alleged, and consequently that the person produced by the defendant, and claiming to be the William Wackerle (husband of the plaintiff), was not what he pretended.

The case was tried at great length, and the largest scope given to a searching inquiry. Its novel aspects induced the court to admit every item of testimony which could shed light on the subject.

After full deliberation on the varied, inconsistent and contradictory evidence, the jury reached a conclusion which was their exclusive province, and the court does not feel justified in interfering therewith. The motion for a new trial is overruled.

GRAY and others *v.* JONES, Assignee, etc., and others.

(Western District of Missouri, Western Division. October, 1882.)

1. EQUITY — TITLE NOT ACQUIRED UNDER FORGED DEEDS. — Purchasers from the grantees in deeds that have been forged acquire no title to the lands conveyed that a court of equity can protect.
2. SAME — PLEADING — TITLE. — Complainants must in their bill allege and prove their own title to the lands claimed; they cannot recover by showing that defendants have no title thereto.
3. PATENT FOR LAND — ASSIGNOR AS TRUSTEE. — A certificate of entry or location under a military land warrant vests in the holder an equitable title to the land, and gives him a right to the patent when issued; and if he conveys the land, or assigns the certificate, and afterwards obtains the patent, he becomes, under the statute (Rev. St., § 2414), as well as upon the plainest principles of equity, a trustee for the person to whom he had previously sold or assigned.

4. STATUTE OF LIMITATIONS — OWNERS OF UNOCCUPIED LANDS. — The statute of limitations does not run against the owner of unoccupied lands until some one assumes to take adverse possession; and this rule applies as well to an assignee in bankruptcy, who, under the Revised Statutes, § 5057, must bring suit within two years, as to the original owner.

5. JURISDICTION — HOLDER OF EQUITABLE TITLE. — Where complainants, holding the equitable title, bring their bill to compel a conveyance of the legal title by those who hold it in trust for them, the jurisdiction of a court of equity in nowise depends upon possession by complainants of the land.

This is a suit for decree for title for about one thousand four hundred acres of land in Nodaway, Atchison and Holt counties, Missouri. The bill sets out that Hugh B. Sweeny was on March 11, 1857, the owner of certain military bounty land warrants; that on March 12 and 13, 1857, he located them on certain lands in controversy in this suit; all these lands were located by Sweeny in his own name; that on April 13 and August 3, 1857, Hugh B. Sweeny, for a valuable consideration, transferred these certificates of location to James S. Phelps; that the assignments of these certificates of location were duly acknowledged, and part of them recorded; that Phelps paid the taxes on this land. The bill sets out that the complainants furnished part of the money to Phelps to enter this land; Phelps furnished one-fourth, Bernard one-fourth, and Henry Young one-half; Young furnished $2,300, Bernard $1,027.70; all the lands were bought in the name of Phelps; all the certificates of location were assigned to him; that he paid taxes on this land until the year 1868, and Jones, his assignee, has paid taxes on these lands ever since; Phelps delivered all the title papers to Jones, his assignee in bankruptcy; that Sweeny represented that these assigned certificates were equal to a warranty deed, and therefore Phelps took no steps to get patents in his own name. No attempt was made to record these certificates of location until the year 1861, four years after Phelps got them. The bill sets out that if the assigned certificates

of location had been filed in Washington, patents would have been issued in the name of Phelps. The bill charges that the patents to these lands were issued to Sweeny shortly after the assignments were made, but these patents remained in the possession of the government of the United States until 1871 or 1872, when they were taken out. The bill sets out that until the delivery of the patents the legal title remained in the United States, and that complainants knew nothing of the patents being issued to Sweeny until 1879 or 1880. Sweeny died in the year 1869, and his heirs are parties to this suit. After the assignment Sweeny claimed no interest in this land, and his heirs claim none now. His heirs have been called upon to convey the legal title, but they refuse to do so. The bill charges that on the second of March, 1872, a deed dated March 22, 1864, signed by Hugh B. Sweeny and duly acknowledged, was filed for record in the office of the recorder of deeds in Nodaway county, Missouri, said deed embracing the lands in controversy in this suit. The bill charges that this deed was a forgery. This is a deed from Hugh B. Sweeny to John Sullivan, of New York. The bill then sets out that Sullivan made a power of attorney to one Richard F. Barrett. Barrett, as Sullivan's attorney, sold and conveyed part of these lands to Grant, Grant to Dubois, and the latter to Welton Grant; and the other lands to the other defendants by several separate deeds. The bill sets out all these deeds; when and where made, acknowledged and recorded. They are all set out as pretended deeds, and they are charged to be frauds on the complainants; that all of the defendants had full notice and knowledge of the complainants' rights. All these deeds are set out as warranty deeds. The bill charges that Barrett, the attorney, had been engaged in frauds and fraudulent and nefarious contrivances in respect to lands in north Missouri, and in the counties of Nodaway, Atchison and Cooper; that Barrett was a very suspicious character, and that he had been engaged for years in perpe-

trating similar frauds, and that his conduct always excited suspicion; that all these deeds were made by all the parties, and received with full notice and knowledge of complainants' rights, and with a view to cheat and defraud the complainants. The bill sets out that notwithstanding the certificates were assigned to Phelps, Sweeny had the legal title, and Phelps the equitable title in trust for the complainants; Phelps went into bankruptcy in 1868; that in 1880 the complainants took possession of all the lands in Nodaway county. The bill prays for a decree for the legal title. These are the allegations of the bill. The answer of the defendants Grant and Dubois denies all title certificates of location and the land in the complainants; they deny all notice or knowledge of any such title; they deny that they have now or ever had any title; they admit all the deeds made to the several defendants, but they deny that these deeds were pretended deeds; they deny all forgery of any deed. The answer says that all these deeds were made in good faith, for valuable consideration, and without notice; that all the purchase money was paid without any notice of any title in complainants, or any of them. The answer denies all fraud, all collusion, forgery and unlawful combination. This answer also sets up the statute of limitations of ten years as a bar to this suit. The complainants filed a general replication. These are all the pleadings.

Botsford, Williams and *A. C. Widdecombe*, for complainant.

L. H. Waters, for Allen.

Karnes & Ess, for Grant.

R. S. Musser, pro se and for R. H. Musser.

McCrary, *Circuit Judge.*—1. The court finds from the evidence that the deeds from Sweeny to Sullivan, from Sweeny to DeBow, and from DeBow to Bowen, mentioned in the bill, were not executed as they purport to have been

by the respective grantors, but were forged; and upon the fact so found the court holds as matter of law that the purchasers from the grantees in said deeds acquired no title which a court of equity can protect. *Sampeyreac* v. *U. S.* 7 Pet. 222.

2. As to several of the tracts of land claimed by complainants, the point is made that they are not described in the certificates of location, which are the foundation of the action. The point is well taken and must be sustained. The complainants must make out their case by positive competent proof, and this is not done by showing that the defendants have no title. A certificate of location, calling for land in section 20, does not entitle the holder to a decree for land in section 21; nor will a certificate, calling for the W. ½ of a particular tract, support a claim for the E. ½ of the same tract. There is no mistake apparent upon the face of the certificates, much less anything to show that some other and different tract was intended; and there is no allegation of mistake in the bill, and no prayer for relief on that ground, or by way of reformation of the instruments. There is nothing on the face of the papers to put a purchaser of property not described therein on inquiry, and certainly nothing to indicate an intention to convey the tracts now claimed. *Scoles* v. *Wilsey*, 11 Iowa, 261.

3. As to all the lands correctly described in the certificates of location, the assignment of the certificates by the locator, Sweeny, to James S. Phelps vested in the latter all the right, title and interest of the former, so that when the patents were subsequently issued in the name of Sweeny, he took in trust for the owners of the equitable title. A certificate of entry or location under a military land warrant vests in the holder an equitable title to the land, and gives him a right to the patent when issued. If the holder of such a certificate conveys the land, or assigns the certificate, before the patent issues, and a patent is afterwards issued to him, he becomes, upon the plainest principles of equity, a trustee for

the person to whom he had previously sold or assigned. By statute all warrants for military bounty land, and all valid certificates of the same, were made assignable, "so as to vest the assignee with all the rights of the original owner of the warrant or location." Rev. St. § 2414. Sweeny had made a location and entry of the land warrants held by him, which vested the equitable title in him and entitled him to the patent. *Wirth* v. *Branson*, 98 U. S. 121. And under the statute, as well as upon general principles, the assignee of the certificates succeeded to all Sweeny's equities, and when the patents issued in Sweeny's name he took in trust for his assignee. *Landis* v. *Brant*, 10 How. 348; *Massey* v. *Papin*, 24 How. 362; *Moore* v. *Maxwell*, 18 Ark. 469; *Key* v. *Jennings*, 66 Mo. 366.

4. The equitable title is in complainants and Stephen E. Jones, assignee in bankruptcy of James S. Phelps. The proof shows that the land was purchased and paid for by complainants and said Phelps, and the interests of the several parties, as established by decree of the United States district court for the district of Kentucky in the year 1872 (which, as between the parties, must be taken as final), is as follows: The heirs of Young are entitled to one-half, S. M. Bernard to one-fourth, and Stephen E. Jones, assignee, to one-fourth. The parties are therefore entitled to recover in these proportions, unless the respondents have succeeded in establishing a good defense.

5. It is insisted that the complainants are barred by the statute of limitations or by laches, and that the respondent, Stephen E. Jones, assignee, is barred by the two years' limitation provided by section 5057 of the Revised Statutes of the United States. Some of the patents were issued to Sweeny in 1859 and others in 1866. But the owner of unoccupied lands is under no obligation to bring suit to quiet his title until some one assumes to take adverse possession. Until then the owner may rely upon his title, whether it be legal or equitable, and the statute of limitations does not run

against him. The bar depends entirely upon adverse possession. *Elmendorf* v. *Taylor*, 10 Wheat. 168; *Pindell* v. *Mulliken*, 1 Black, 585. This suit was commenced in June, 1880. The court finds from the evidence that none of the respondents had, for ten years prior to that date, held possession of the lands in controversy, or any of them, adversely to the complainants. It follows that the defense of the statute of limitations and of laches is bad as to complainants. This, however, does not determine the question of the right of Stephen E. Jones, as assignee in bankruptcy, to recover the one-fourth interest of Phelps; and this brings us to the question —

6. Whether said assignee is barred by the provisions of said section 5057 of the Revised Statutes, which bars a recovery by an assignee in bankruptcy unless suit be brought "within two years from the time when the cause of action accrued." The same rule prevails under this statute as under the general statute of limitations,— the cause of action is deemed to have accrued when the hostile claim is asserted by adverse possession. *Banks* v. *Ogden*, 2 Wall. 57. It is admitted that the lands claimed by defendant Allen in Holt county were held by him adversely for more than two years prior to the commencement of this suit. As to those lands, therefore, the right of action of the assignee is clearly barred. As to the lands claimed by defendant Musser there was clearly no adverse possession prior to July, 1879, which was less than two years prior to the commencement of this suit. There is no evidence of adverse possession of the lands claimed by the other defendants, and it follows that, as to all the lands except those claimed by defendant Allen, the defense of the two years' statute of limitation fails.

7. It is insisted that the bill should be dismissed for the reason that the complainants cannot maintain this action unless they are in the lawful and peaceful possession of the land sought to be recovered. The doctrine here sought to be invoked has no application to the case. The complain-

ants, holding the equitable title, bring their bill to compel a conveyance of the legal title by those who hold it in trust for them. In such a case the jurisdiction in nowise depends upon possession. *Branch* v. *Mitchell*, 24 Ark. 431; *Smith* v. *Orton*, 21 How. 241.

The result is that there must be a decree in favor of complainants and respondent Stephen E. Jones, assignee, for the interest claimed by them respectively in all the lands in controversy in this case, except (1) those not described in the certificates of location; and (2) those adversely held by respondent Allen, situated in Holt county, as to which the right of action of said assignee is barred. The costs will be apportioned so that the respondents who claim lands not recovered by complainants shall pay no costs, and shall recover their costs. Decree accordingly.

KREKEL, *District Judge*, concurs.

RIDENBAUGH *v.* BURNES.

(Western District of Missouri, Western Division. 1882.)

1. ORDER OF PROBATE COURT — CONCLUSIVENESS OF. — An order of a probate court approving the final report of an administrator and discharging him from his trust may be attacked and set aside in a court of equity upon satisfactory proof that the administrator has failed, either by mistake or fraud, to account for money collected by him, or for property which came into his hands by virtue of his office.
2. EQUITY PRACTICE — REFERENCE — ACCOUNTING. — Where the proof fails to furnish a proper basis for an accounting, but enough appears to make it desirable that the real facts be made to appear, the court may, in its discretion, refer the case to a master, with power to take further testimony and report thereon as to both law and fact.

Bill in chancery brought to set aside a settlement made by the defendant as administrator of the estate of George Young, deceased. The defendant was appointed as such ad-

ministrator November 24, 1874, and thereupon took charge of the assets of the estate, consisting largely of notes and accounts. On the 5th of December, 1874, defendant was ordered by the probate court of Buchanan county, Missouri, under whose orders he was acting, to loan the money belonging to the estate at the highest rate of interest he could obtain. He made numerous loans, and collected in the aggregate a large sum of money as interest, with which he charged himself, but the complainant insists that he collected other sums as interest, with which he did not charge himself and for which he has never accounted. He also collected and accounted for certain rents, but the complainant insists that he did not account for all the rents collected by him. The defendant claimed and was allowed a credit in his settlement with the probate court on account of certain notes against insolvent parties, and complainant insists that these credits were wrongful and should not be allowed, because the notes were taken by defendant for loans of the funds of the estate, made to said insolvent parties when they were notoriously insolvent, and that the fact could have been ascertained by defendant by the use of ordinary diligence. Defendant acted as administrator from November 24, 1874, to January 16, 1880, when he made his final settlement with the probate court and was discharged.

M. R. Singleton, Doniphan & Reed and *J. E. Merryman*, for complainant.

L. H. Waters and *Boggess, Cravens & Moore*, for defendant.

McCrary, *Circuit Judge.*— It is insisted by counsel for defendant that complainant is estopped by the order of the probate court approving the final report of the defendant as administrator, and discharging him from his trust. It is true, as a general proposition, that final settlements by administrators with the probate courts are to be regarded as

judgments; but I am unwilling to place them on the same footing with judgments rendered in causes litigated, and where all the parties in interest are present in court to assert and maintain their rights. An administrator acts in a fiduciary capacity. He is a trustee for the heirs and creditors of the estate, who are often infants or persons otherwise disabled to protect their rights. Such settlements are generally *ex parte*, and there is, even where, as in the present case, counsel are called in to examine the accounts, very little opportunity to ascertain any facts not communicated by the administrator, or apparent upon the face of the papers and records of the court. Such a settlement, in my opinion, may be attacked and set aside in a court of equity, upon satisfactory proof that the administrator has failed, either by mistake or fraud, to account for money collected by him, or for property which came into his hands by virtue of his office. The heirs cannot be bound by a settlement in which the administrator does not account for all the assets. A failure to so account is indeed a fraud, either in fact or in law, and vitiates the settlement. *Pratt* v. *Northam*, 5 Mason, 103; *Clyce* v. *Anderson*, 49 Mo. 41; *Byerly* v. *Donlin*, 72 Mo. 271.

As the bill plainly charges that defendant did not account for all the interest and rents collected by him, it is the duty of the court to look into the proofs upon the subject, and to set aside the settlement and award the complainant relief if her allegations are supported by sufficient evidence. With respect to the interest, the proof fails to show what loans were made by defendant, the amounts loaned, and the time for which made, and the rate of interest; and of course it does not show the aggregate amount of interest collected by him. Complainant relies upon the admissions in the answer that defendant "kept the money of the estate that came to his hands actively at interest for the use and benefit of the estate," and that he at no time "had any considerable amount of money of the estate that was not at interest." It is in-

sisted that, in view of these admissions in the answer, it is the duty of the court to charge defendant with interest upon the aggregate amount of available assets in his hands as per the inventory. But the admissions relied upon must be considered in connection with the other allegations of the answer. They cannot be taken out of their proper connection and read by themselves. If complainant seeks to charge defendant upon the admission contained in the answer, it is the right of the defendant to have the whole of that pleading considered, and when so considered it is impossible to hold that it gives us any basis upon which to determine whether any, and if any, what, sum has been collected by defendant as interest, and remains unaccounted for. It is alleged in the answer that the estate was indebted in large sums, for which judgments were recovered, which defendant was compelled to pay. It is also alleged that frequent demands for money were made by complainant, and that large sums were paid out by him for taxes. Besides these allegations, the answer, which is very long, specifically denies each and every allegation of the bill which charges fraud or misappropriation of the funds of the estate, or a failure to account. It needs no argument to show that the answer does not contain admissions upon which there can be an accounting as to interest.

The proof is equally defective with regard to the rents. The complainant shows that there passed into the hands of the administrator certain real estate which was at one time rented at certain prices. If the defendant collected rent upon this property during the whole period of his administration at the prices at which it was rented during part of that period, then it is said, and I think correctly, that he has not accounted for all that he received. But the court cannot assume, in the absence of proof, that the property was rented during the whole of that period at the same or at any other price, nor can we assume that all the rent that accrued was collected. It is thus seen that the proof

fails to furnish a proper basis for an accounting, and that it would be impossible from the proof submitted to ascertain and state any definite sum as the sum recovered by defendant and not accounted for. Under these circumstances the court may either dismiss the bill, so far as these items are concerned, or refer the case to a master with power to take further testimony and report. In the exercise of this discretion I am disposed to adopt the latter course. If the complainant is unable to make further or better proof, it is her misfortune, as the burden is upon her to overcome by proof the strong presumption which the law raises in favor of the correctness of the final settlement with the probate court. The proof as it now stands leaves the essential facts relied upon by complainant unproved; but enough appears to make it desirable that the real facts be made to appear, if that is practicable. I am the more inclined to adopt this course because the defendant has not seen fit to testify in the case. It is true that he was not bound to do so until complainant had made at least a *prima facie* showing, but it is impossible to overlook the fact that it would have been easy for him to have made his defense perfectly satisfactory, if there is no truth in the complainant's allegations, by going upon the stand and testifying to facts which must be within his knowledge.

As the case must go to a master, the court will reserve its ruling upon the question raised concerning the worthless paper for which defendant has credit in his accounts, and that matter, with the others, may be considered and reported upon by the master.

ORDER.

It is ordered that this cause be referred to a master, with instructions to consider the proofs on file, and such other evidence as may be taken under this order, and report thereon as follows:

(1) Whether defendant, as administrator of the estate of

George Young, deceased, received any sum or sums as interest which he did not report to the probate court and account for; and if so, what is the amount of the same? (2) Whether defendant, as such administrator, received any sum or sums as rent which he did not report to the probate court and account for; and if so, what is the amount of the same? (3) Whether defendant should be credited for notes of Hensley, Skelton & Co. and G. R. Hines, either or both, and report his conclusions as to both law and fact.

With respect to the first and second of said matters of reference the master may, upon the application of either party, take further proofs at such times and places as he may determine.

RADFORD, Assignee, etc., *v.* FOLSOM and others.

(Southern District of Iowa, Western Division. November, 1882.)

1. PLEADING — ACTION PENDING IN STATE COURT — FOREIGN JURISDICTION. — As the jurisdiction of a United States court cannot properly be considered as foreign in relation to the jurisdiction of a state court within the same territorial limits, an action pending in a state court may be pleaded in abatement of a subsequent action commenced between the same parties in the United States court for the district embraced by such state, for the same subject matter and the same relief.
2. SAME — FORMER ACTION — PENDENCY OF ACTION IN OTHER STATE. — While an action pending in the courts of one state cannot be pleaded in abatement of an action commenced in the court of another state, even if there be identity of parties, of subject matter, and of relief sought, the two jurisdictions being *foreign* to each other, the pendency of a former suit at law or in equity between the same parties, for the same cause and the same relief, in a court of the state in which the second suit has been brought, will be cause of abatement if pleaded in the second suit.

This cause is now before the court upon a plea to the bill interposed by the respondents, which is termed a plea in bar, but which, in effect, is a plea in abatement. The pres-

ent bill is filed by George W. Radford, assignee in bankruptcy of Frank Folsom, against Jeremiah Folsom in his own right, Jeremiah Folsom, administrator of the estate of Sarah M. Folsom, deceased, and Adele, Florence and George B. Folsom, minor heirs of said Sarah M. Folsom, who appear by J. B. Blake, their guardian; and in substance the bill avers that complainant is the owner of certain realty in the bill described, and prays that his title thereto may be confirmed and quieted as against the respondents, and that he may have a writ of possession. The plea sets forth that prior to the commencement of this proceeding, to wit, in the year 1873, Frank Folsom, to whose rights his assignee, George W. Radford, was afterwards substituted, brought an action against Jeremiah Folsom and Sarah M. Folsom in the circuit court of Pottawattamie county, Iowa, "for the same matters and to the same effect, and for the like relief and purpose as the now complainant doth by his present bill set forth; in which said action issue was joined, and the same is still depending in said honorable court, and is undisposed of." To this plea the complainant interposes a demurrer, thus presenting the question whether an action pending in the state court of Iowa can be pleaded in abatement of a subsquent action commenced between the same parties in the United States court for the district of Iowa, for the same subject matter and the same relief.

Sapp & Lyman, for complainant.

Mayne & Reid and *H. H. Trimble*, for defendants.

SHIRAS, *District Judge*.— The doctrine is now well settled that an action pending in a foreign jurisdiction cannot be pleaded in abatement of an action commenced in a domestic forum, even if there be identity of parties, of subject matter, and of relief sought. *Smith* v. *Lathrop*, 44 Pa. St. 326; *Bowne* v. *Joy*, 9 Johns. 221; *Allen* v. *Watt*, 69 Ill. 655; *Insurance Co.* v. *Brune's Assignee*, 96 U. S. 588; *Stanton*

v. *Embrey*, 93 U. S. 548. It is equally well settled that at law the pendency of a former action between the same parties, for the same cause and relief, in a court of the state in which the second action has been brought, will be cause of abatement if pleaded in the second action. *Insurance Co.* v. *Brune's Assignee*, 96 U. S. 588. In equity, the general rule is the same. Story's Eq. Pl. §§ 736–741. In *Insurance Co.* v. *Brune's Assignee*, 96 U. S. 588, it is held that "the rule in equity is analogous to the rule at law," and the statement of Lord Hardwicke in *Foster* v. *Vassall*, 3 Atk. 587, is quoted approvingly, to wit, that "the general rule of courts of equity with regard to pleas is the same as in courts of law, but exercised with a more liberal discretion."

The case of *Insurance Co.* v. *Brune's Assignee* further states the rule to be, that "a bill in equity pending in a foreign jurisdiction has no effect upon an action at law for the same cause in a domestic forum, even when pleaded in abatement;" and further, "it has no effect when pleaded to another bill in equity;" that is to say, a bill pending in a foreign forum will not, if pleaded, abate a bill pending in a domestic forum.

The reasons usually assigned in support of this doctrine are that the court of the one state or country cannot judicially know whether the rights of the plaintiff are fully recognized or protected in such foreign state or country, nor whether the plaintiff can enforce to full satisfaction any judgment he may obtain in the foreign tribunal; and further, that a court will not compel a plaintiff to seek his remedy in a foreign forum; or, as it is said by the supreme court of Connecticut in *Hatch* v. *Spofford*, 22 Conn. 485: "That country is undutiful and unfaithful to its citizens which sends them out of its jurisdiction to seek justice elsewhere." None of these cases, however, meet the exact point presented by the plea interposed in the case now under consideration; for in all of them it will be found that the proceedings were pending in the courts of different states or circuits, whereas in this case

the two proceedings are pending within the same state, but the one in the state and the other in the federal court. We do not find that this question has ever been finally settled by the supreme court of the United States, nor by the circuit court for this circuit.

In the case of *Brooks* v. *Mills Co.* 4 Dill. 524, is found a full and able discussion of the question in the opinion of Judge Love, both upon principle and authority, with a review of the decision of Mr. Justice Clifford in *Loring* v. *Marsh*, 2 Cliff. 322; and the evils resulting from permitting parties to litigate the same subject matter in two courts exercising judicial power within the same territorial limits are very clearly and forcibly shown; and the conclusion is reached that "it would seem most rational and just that a plea in abatement should be allowed in order to avert consequences so mischievous." The judgment of the court, however, in that cause was placed upon another ground; the plea in abatement being overruled for the reason that it appeared upon the face of the plea that the parties to the suit in the state court were not the same as the parties to the bill in the United States court, and the question now before the court, though discussed, was not authoritatively determined. To the report of this cause in 4 Dill. is attached a full note by the learned reporter, citing the leading cases on the general question; and it is therein stated that "it is clear that the foregoing cases do not go to the length of holding that the pendency of a prior suit in a state court is not a valid plea in abatement to a suit for the same cause, and between the same parties to an action, in a United States court sitting in the same state;" and the reporter further states that Mr. Justice Miller, in a case in the Minnesota circuit, "intimated his inclination to the opinion that where the parties are identical, and the scope of the subject matter equally so, the pendency of a prior suit in the state court, within the territorial limits of the district where the second suit is brought in the federal court, may be properly pleaded in abatement;

or, at all events, will operate to suspend the action in the latter;" but, as we understand the statement of the reporter, this was not decided or ruled in the cause, so that, as already stated, the question remains an open one. As authorities bearing upon the question more or less directly, see *Earl* v. *Raymond*, 4 McLean, 233; *U. S.* v. *Dewey*, 6 Biss. 502; *Lawrence* v. *Remington*, id. 44; *Smith* v. *Atlantic F. Ins. Co.* 22 N. H. 21.

In this condition of the authorities, what is the conclusion that should be reached from a consideration of the reasons upon which is based the doctrine that under certain circumstances the pendency of a prior action may be pleaded in abatement of an action commenced in the courts of the same state? The reason for the rule that the pendency of a former action may be pleaded in abatement of a second action is, that if the complaining party has already an action pending in which he can obtain full relief, there is no justification for harassing the defendant by a second action for the same subject matter. If it should appear, however, that in the second action the plaintiff can avail himself of some legal or equitable advantage, not open to him in the first action, then a legal reason is shown for the bringing of the second action, and the pendency of the one would not ordinarily abate the other. This is the reason why, as a rule, the pendency of an action at law cannot be successfully pleaded in abatement of a suit in equity.

As is said in Story's Eq. Pl. § 742: "It can scarcely ever occur that the remedial justice and the grounds of relief are precisely the same in each court, for if the remedy be complete at law, that is an objection to the jurisdiction of a court of equity."

In the well-considered opinion of the supreme court of Connecticut in *Hatch* v. *Spofford*, *supra*, it is stated, in substance, that while the pendency of a prior suit of the same character, between the same parties, brought to obtain the same end, is at the common law good cause of abate-

ment, yet the rule is not one of unbending rigor nor of universal application, nor a principle of absolute law, but rather a rule of justice and equity, and that a second suit is not, as a matter of course, to be abated as vexatious, but all the attending circumstances are to be carefully considered, and the true inquiry is, what is the aim and purpose of the plaintiff in the institution of the second action,— is it fair and just, or is it oppressive?

If it appears that the former proceeding, whether at law or in equity, is pending in a foreign state or country, and in this respect the states of the Union are foreign to each other, this fact in itself determines the question adversely to the plea in abatement.

If it appears that the two actions are pending within the same state, and are both at law or both in equity, and are identical in parties, subject matter, and relief sought, then no necessity appears for the institution of the second proceeding, in which event it would clearly be oppressive upon the defendant, subjecting him to unnecessary costs, and in such case the pendency of the first should abate the second proceeding.

On the other hand, if the two proceedings are pending in the same state, between the same parties, and concerning the same subject matter, yet the relief sought is different, as in cases of an action at law and suit in equity, when the pendency of the one should not ordinarily operate to abate the other; for the difference in the relief obtainable in the two jurisdictions constitutes a sufficient legal reason for the maintenance of both proceedings.

But it is urged that while the second of the rules as above given may be applicable to cases pending in courts of the same state, yet it is inapplicable when one case is pending in the state and the other in the federal courts for the same state, the argument being that the two jurisdictions are foreign to each other, and hence that the pendency of a suit in the one court cannot be pleaded in abatement of a suit in the other.

It is true that the state and federal tribunals owe their origin to different sources, but when created and brought into action within the same territorial limits, can it be fairly said that there are two states or jurisdictions co-existing within the same limits, and yet foreign to each other, in the sense that Iowa is foreign to New York? The same statutory and common law is enforced by both tribunals, and it cannot be said that if a party is relegated to the state court for the enforcement of his rights, that he is thereby sent into a foreign state or country, whose laws and modes of proceeding are unknown or unfamiliar.

As we have already shown, the main purpose of the rule allowing the pendency of one action to be pleaded, under given circumstances, in abatement of a second, is to prevent a defendant from being unnecessarily harassed, and subjected to additional costs by two proceedings when one will fully protect all the rights of the plaintiff. Now, it is apparent that the cost and vexation caused to the defendant by the institution of the second suit is, to say the least, not lessened by the fact that it is brought in the federal while the first is pending in the state tribunal. The evil to be remedied is not obviated by the fact that the two proceedings are pending in tribunals owing their origin, the one to the state, the other to the federal government, yet acting within the same territorial limits.

If it appears that the two proceedings, being between the same parties, and for the enforcement or protection of the same rights, will result in the granting of the same remedy, operative within the same territorial limits, then it would seem clear that the second is not needed to protect or enforce the plaintiff's rights; and as the defendant must of necessity be put to additional trouble and expense in defending the second action, it follows that he is thereby vexatiously harassed, and in such case he should be enabled to protect himself by causing the abatement of the second

action. It is the duty alike of the state and the United States court to protect a defendant from unnecessary and vexatious litigation. If the first action is brought in the state and the second in the federal tribunal, or *vice versa*, it is the bringing of the second action that constitutes the oppressive and unnecessary act on part of plaintiff, and the corrective should be applied in the court whose jurisdiction is invoked oppressively and wrongfully. Again, the fact that the one action is pending in the state and the second in the federal court, instead of being a reason why the second should not be abated, is, on the contrary, a weighty argument for just the opposite conclusion; for if the two proceedings are allowed to proceed at the same time, there may arise all the difficulties from a conflict between the two jurisdictions, acting within the same state, which are so fully presented in the opinion in the case of *Brooks* v. *Mills Co.*, already cited.

Applying these principles to the case before the court, it follows that the demurrer to the plea must be overruled, for the demurrer admits the allegation of the plea that the former suit pending in the state court is for the same subject matter, and to the same effect, and for the like relief and purpose, that is contemplated in the second proceeding; and if that be true, then, in the absence of any showing justifying the institution of the second suit, as being needed for the full protection of complainant's rights, it would necessarily follow that the second suit was uncalled for, and, therefore, vexatious.

In the argument of the demurrer, it was urged that the second suit was necessary for the enforcement of plaintiff's rights, for the reason that the supreme court of the state had decided in the first proceeding that the suit was prematurely brought, and hence should be dismissed. The effect of such fact cannot be considered on the demurrer, as it is not presented by the record, and the complainant, if he

desires to urge the same as a reason justifying the bringing of the second suit, must bring the same to the knowledge of the court in the further progress of the cause.

McCrary, *Circuit Judge*, and Love, *District Judge*, concur.

Fuller and others *v.* County of Colfax.

(District of Nebraska. November, 1882.)

1. Removal of Cause—Courts—Suits Removable.—A board of county commissioners of a county created by the laws of the state of Nebraska is in no just or proper sense a *court* within the meaning of the removal acts of congress; and a mere claim against a county for right of way for a public road, while the same is pending before the county board, does not constitute a *suit* within the meaning of the said removal acts.

Motion to remand cause to state court.

Dundy, *District Judge.*— This cause was removed into this court from a state court held within and for Colfax county. The defendant moves to remand the same, for the reason that the suit was removed from an appellate court, and not from the one in which the suit was brought. If this be true, it must, of necessity, be decisive of the motion.

In considering the motion two questions arise: *First*, is a board of county commissioners a *court* within the meaning of the removal acts of congress; and *second*, is a mere claim for damages for right of way for a public road, presented to the county board, a *suit*, within the meaning of the said removal acts, so long as the claim there remains for consideration?

The state law provides for paying for the right of way necessary in locating all public roads. If damages are sustained by the owners of land through which a road is located, the county is primarily liable therefor, and the manner of mak-

ing the claim, as well as the mode of making the payment, is here perfectly well understood. After the location of the road, all that seems necessary for the injured party to do is to make known to the county board the fact that damages are claimed for the right of way. If the claim is thought to be just and reasonable, the county board allows it, and draws warrants on the county treasury for the amount of damages awarded. If the claimant should be dissatisfied with the amount of damages so awarded him, he can appeal to the district court of the proper county, where the case is to be tried *de novo*. Thus it will be seen that the remedy provided by law in cases like the present one is alike speedy, efficacious, inexpensive.

The plaintiffs were damaged, as they claim, in consequence of a public road being located through their lands; and they presented to the county board a claim in the sum of $5,000 therefor. The board reduced the claim, or sum allowed, to $250, and the claimants appealed to the district court, *all* of which was done in strict accordance with the law. In presenting a claim to the county board for allowance, no formal proceedings are at all necessary, no pleadings of any sort are required to be filed, no process issued for any purpose whatever connected with the matter, and no formal judgment follows either the rejection or allowance of a claim by the board. The claim, when so made, is simply *audited*, *allowed*, or *rejected*, as justice and reason seem to require. In case of an appeal to the district court, the appeal is docketed, and pleading are filed, and the cause then in all respects proceeds in the usual and ordinary way. The cause is then, in every sense of the term, in a *court*, and is also then, in every sense of the term, a *suit*.

Now, what is usually understood by the words "*court*" and "*suit*," where we find them in legislative enactments or in legal proceedings? Blackstone says a "court is a place wherein justice is judicially administered." To administer justice judicially there *must* be a *judge*, and usually, though

not always, there are also other officers, such as clerk and sheriff or marshal. That also implies the right to issue compulsory process to bring parties before the court, so that jurisdiction may be acquired over the person or property which forms the subject matter of the controversy. To administer justice judicially, two parties to a controversy must exist; there must be a wrong done or threatened, or a right withheld, before the court can act. Then a hearing or trial follows, and the "justice to be judicially administered" results in a formal judgment for one of the parties to the controversy. The judgment to be pronounced usually has full binding force, unless modified or reversed. The courts can issue the proper process to carry their judgments into effect, and in that way subserve the great ends of their creation. But this is not so with the county boards in this state. They are not clothed with the necessary power to issue compulsory process to bring parties litigant before them. They cannot, in cases like the one under consideration, issue process to compel the attendance of witnesses. They cannot and do not enter formal judgments in cases presented to them for their consideration. They have no authority to execute any judgments, if they should thoughtlessly undertake to enter them. They have but one party before them on whom their orders can operate. In short, the county board is so totally unlike a *court*, and so different in its constitution and its objects, that I am unable to see any similarity between them.

If the county board cannot be regarded as a *court*, it will follow as a necessary consequence that no *suit* was pending in this case until the appeal from the order of the board was filed and docketed in the district court. Two parties to a suit seem to be almost indispensable: one who seeks redress, and the other who commits a wrong or withholds what is justly due another. The parties must stand in such relation to each other that the machinery of the court will operate on them when their powers and their aid are invoked.

No such a condition of things existed so long as the claim remained before the county board. But when the appeal was taken, and docketed in the district court, we then for first time find a *suit* pending in the *court* where none of the elements of either are wanting. It is such a *suit* that can be removed from such a *court*, as the removal acts of congress contemplate.

I conclude, then, that the board of county commissioners of Colfax county is not a "*court*," and that this "*suit*" was never pending in any other court than the district court of Colfax county, from which it was removed to this court, and that it was, therefore, properly removed herein.

The motion to remand is overruled.

McCrary, *Circuit Judge*, concurs.

Mr. Munger, for defendant.

Mr. Wakeley, for plaintiff.

Note.[1]—A cause may be removed from any state court, whether of limited or general jurisdiction, if citizenship and amount are within the statute requirements (*Gaines* v. *Fuentes*, 92 U. S. 10; *S. C.* 8 Chi. Leg. News, 225); but a justice's court is not a state court. *Rathbone Oil Co.* v. *Rausch*, 5 W. Va. 79. The right is confined to parties litigant in state courts. The act does not apply to territorial courts, although on the admission of such territory as a state the suit passed into the jurisdiction of the state court. *Ames* v. *Colorado Cent. R. Co.* 4 Dill. 251; *S. C.* 4 Cent. Law J. 190. See *Watson* v. *Brooks*, 13 Fed Rep. 540. So, actions brought by the District of Columbia against an alien cannot be removed. *Cessel* v. *McDonald*, 57 How. Pr. 175; *S. C.* 16 Blatchf. 150.—[Ed.

[1] From *Federal Reporter*.

COQUARD *v.* CHARITON COUNTY.

(Western District of Missouri, Western Division. 1888.)

1. POWERS — WHEN CANNOT BE DELEGATED. — Whenever trusts or discretionary powers are to be exercised, the exercise thereof cannot be delegated.
2. COUNTY INDEBTEDNESS — POWERS VESTED IN COUNTY COURTS. — Where the legislature has intrusted the county courts and judges thereof with the settlement and compromise of the bonded indebtedness of their counties, they cannot divest themselves of these trusts and delegate them to another.
3. SAME — SAME — CANNOT BE DELEGATED. — A county court has no power to enter into a contract with a citizen of the state, delegating to such citizen the power and authority to compromise the outstanding indebtedness of such county, and give to such citizen the exclusive right to deal with the bondholders of the bonds of such county as its agent in effecting such compromise.

KREKEL, *District Judge.* — Plaintiff Coquard, a citizen of the state of Illinois, sues Chariton county, one of the counties of the state of Missouri, on the following contract:

"This agreement, made and entered into by and between the county of Chariton, in the state of Missouri, party of the first part, and Louis A. Coquard, of the city of St. Louis, party of the second part, witnesseth, that for and in consideration of the services rendered and to be rendered by the party of the second part in and about the compromising the debt now outstanding of said party of the first part, and in consideration that said party of the second part has agreed to use due diligence and his best endeavors in effecting such compromise for the space of one year from the date hereof, party of the first part agrees that party of the second part shall be its agent for the purpose of negotiating and effecting a compromise of its indebtedness for the said space of one year, and that for that time it will employ no other agent, and give party of the second part the exclusive right to deal with the bondholders of the bonds of said county as its agent in effecting such compromise; that party of the

first part will refer all letters of inquiry or inquiries of any kind about said indebtedness, or in compromising the same, to party of the second part. Said party of the second part shall make no charges against said county for his services in effecting such compromise; but the party of the first part will pay party of the second part ninety-five (95) cents on the dollar of the principal and past-due interest for each of the bonds known as the Chillicothe and Brunswick issue of said county, delivered to party of the first part by party of the second part during said time, and eighty (80) cents on the dollar of the principal and past-due interest for each of the bonds known as the Missouri and Mississippi issue, delivered to party of the first part by party of the second part within said time, which payments are to be made in new six per cent. compromised bonds of said county, duly executed. And party of the second part shall have for his compensation the difference between the amount he can obtain said bonds for from the holders, and the amount above specified.

"J. B. HYDE, President Chariton County Court.

"L. A. COQUARD.

"October 20, 1879."

The petition is in the usual form, the various counts setting out the particular debts compromised, claiming the several amounts to which plaintiff supposes he is entitled under the contract for his services. To this petition defendant, by its attorneys, files a demurrer, assigning, among other causes, want of power in the county court of Chariton county to make the contract. It appears that the legislature of the state of Missouri, in order to enable the indebted counties of the state to settle and compromise their bonded indebtedness, passed sundry acts having that object in view. It is claimed by the plaintiff that under one of these acts, namely, that of April 12, 1877, county courts of indebted counties have power to make the contract sued on. The act cited in its first section authorizes counties, townships, cities and towns,

through the county courts, either for the counties themselves or for any township, or by the proper authorities of cities or towns, to enter into contracts with any person or persons, corporations or associations, for the compromise, purchase or redemption of all bonds and coupons, whether due or not due, including judgments, and provides for the issuing of new bonds to be used in such compromises. It is not claimed that the act, in any of its provisions, gives direct authority to county courts to employ agents to effect the compromises authorized, but the argument is that under this law, when viewed in connection with the acts of 1875 and 1879, upon the same subject, such authority may be inferred. Moreover, it is contended that from the nature of the business to be transacted and the unsuitableness of the county courts themselves to attend to it, it is reasonable to suppose the employment of agents was contemplated, and hence the law should be so construed as to allow it. On looking into the act of 1875 it is found that the governor of the state is authorized to appoint a general municipal agent, who is empowered to receive propositions from the indebted municipalities regarding the terms upon which they will settle, and to ascertain from the bondholders upon what terms they will accept new bonds. The fifth section of the act provides for a vote by the people of the indebted county on compromises, and authorizes the county court to appoint an agent, who is to report to the general state agent the terms upon which it is proposed to settle.

The acts of 1879 are enlargements of former acts on the subject of compromises, and no agencies are therein provided for except in the county and township act of May the 16th, which directs the treasurers to be appointed as agents for a specified purpose. The various acts cited, and all laws bearing upon the subject under consideration, must be read in connection with the forty-eighth section of the fourth article of the present constitution of Missouri, if we attempt to arrive at and be guided by legislative intent. That section,

among other things, prohibits the legislature from passing any act authorizing counties or municipalities passing any claims "under an agreement or contract made without express authority of law," and declares such unauthorized agreements or contracts as null and void. The county courts of Missouri are charged with the control and management of county property, the assessment, levying and collection of taxes, laying out roads and keeping them in repair, and the transaction of county business generally. It is not denied that the county court may employ agents when required in performance of the duties imposed on them under the law. Nothing can be gathered, however, from the laws referred to, nor the general scope of the legislation of Missouri, indicating that county courts have power to divest themselves of any of the trusts imposed on them for a definite or indefinite time, and that is really the question here. Could the judges of the county court of Chariton county make a contract by which they divested themselves of the power to compromise the bonded indebtedness of the county, and delegate that power for the time of one year to the plaintiff? It may be taken as well established law that whenever trusts or discretionary powers are to exercised, the exercise thereof cannot be delegated. *In re Quong Woo*, 13 Fed. Rep. 229; Dill. Mun. Corp. § 61; 43 Mo. 352; 48 Mo. 167; 61 Mo. 237, 282.

The judges of the county court of Chariton county, in common with other county courts of the state, were selected by the voters under provisions of law. The legislature of Missouri has intrusted to these courts and the judges thereof the settlement and compromise of the bonded indebtedness of their counties. The county court of Chariton county, by the contract sued on, undertook to divest themselves of these high trusts, and delegate them to the plaintiff. This cannot be done without express authority of law. Public policy would seem to be equally adverse to the entering into of such a contract as the one under consideration. The county

court thereby deprived itself of the means of making favorable settlement and compromises should opportunities occur, placing all such chances in the hands of a person who, on his part, assumes no responsibility whatever, but making it his interest to depress the credit of the county to the injury of the people thereof, that he, and not the county, may profit thereby. When such contracts are made by individuals, and the law is invoked, courts will look with a critical eye at them, and allow no fruits to be reaped therefrom except by compulsion, as it were. Parties will not be permitted to take advantage of such contracts when the interest of the public is concerned. It is unnecessary to speak of the opportunities for fraud such contracts afford, for the county court of Chariton county is not charged with any intentional wrong, nor is the defendant such a manipulator of public securities as could seriously affect the market value of Chariton county bonds to his advantage. Both for want of power in the county court to make the contract under consideration, as well as on the ground of public policy, it is held that the plaintiff has no cause of action on the instrument in suit. The demurrer to the petition is therefore sustained.

McCrary, *Circuit Judge*, concurs.

Fisher & Rowell and *Botsford & Williams*, for plaintiff.

Dobson & Bell, for defendant.

Castello *v.* Castello and others.

(Western District of Missouri. October, 1882.)

1. Practice — Service on Parties Non-resident — Act of Congress, March 3, 1875, § 8.— The eighth section of the act of congress of March 3, 1875, authorizes the bringing in of parties to a suit who are *non-residents* of the district where the suit is brought, by service of an order of the court, as therein provided.

Castello v. Castello and others.

2. SAME — "CLOUD ON TITLE" — EQUITABLE RELIEF — JURISDICTION. When a complainant alleges in her bill that she was fraudulently induced to execute an agreement to receive less than her lawful share of her husband's estate, and that the estate is being divided according to such fraudulent agreement instead of being distributed in accordance with the laws of the state where it is being administered, the suit must be considered as instituted "to remove a cloud upon title to personal property," within the meaning of section 8 of the act of March 3, 1875, and as calling for equitable relief within the jurisdiction of the United States circuit court.

KREKEL, *District Judge.*— Complainant, a citizen of the state of Kansas, brings her bill against William H. and Charles L. Castello, citizens of the state of Illinois, Mary E. Hickok and Franklin Hickok, her husband, and George N. Nolan, public administrator of Jackson county, Missouri, the three last-named defendants being residents of the state of Missouri, setting forth that plaintiff was the wife of James O. Castello; that after their marriage they moved to and resided in Kansas City, Missouri, where her husband, in July, 1881, died intestate; that soon after his death his brothers and sister attempted to take possession of his estate, and to protect it she had the public admininistrator of Jackson county, Missouri, take charge of the same; that afterwards said brothers and sister, under the pretense of making a settlement and compromise with her, and paying her for the interest she had in her husband's estate, by deceit and fraud induced her to sign an instrument of writing reciting that she had agreed to take one-fourth of her husband's estate; that said agreement has been filed in the probate court of Jackson county, which is now administering the estate; and that it is insisted by the defendants that the distribution thereof shall be made in conformity to said fraudulent agreement, instead of the laws of the state of Missouri.

The public administrator, Nolan, is made a party, and asked to be enjoined from paying over, so that complainant's estate may be preserved. She prays for the setting aside and annulling of the instrument referred to, so that the probate

court having in charge the estate may be free to distribute the same according to law, and for general relief. As to two of the defendants, William H. and Charles L. Castello, inhabitants of the state of Illinois, an affidavit as to their non-residence in this district is filed, with prayer that an order for personal service on them in Illinois be made as authorized by the eighth section of the act of congress of the third of March, 1875. The Illinois defendants appear by attorney and file their motion to set aside the order made by the court, directing them to be served, as improvidently made. The remaining defendants file their demurrer to the bill. The motion to set aside the order of service, and the demurrers, are the matters to be determined.

In support of the motions to set aside the order of service, the ground is taken that the act of congress cited does not authorize the bringing in of parties non-residents of the district in which the suit is brought; that the court can get jurisdiction only by seizure of property or personal service in the district. The eighth section of the act of congress cited provides:

"That when, in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon, or claim to, or remove any incumbrance or lien or cloud upon, the title to real estate or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur by a day certain, to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person in possession or charge of said property, if any there be."

Similar provisions for personal service on defendants outside of the territorial jurisdiction of the court are found in the statutes of Missouri, sections 3494 and 3501. The pro-

visions of the act of congress differ from the Missouri act in some particulars, but to whatever the law of congress extends, the provisions thereof are broader in their application to the subjects which may be litigated, as we shall hereafter see, on considering the demurrers. In support of the view by counsel regarding obtaining jurisdiction, admiralty services, and decisions of courts regarding such, are cited and relied on. Admiralty proceedings are based upon the law that the thing seized is the defendant in the action,— the responsible party, so to speak,— and all notices are general, and not directed to any person except those in possession, who are notified that the property has been seized. The service provided in the act of congress of 1875 must be taken to be a service enabling the court to fully deal with the parties and their rights pertaining to the subject matter of the litigation.

The question as to whether, under the act of congress, viewed in connection with the Missouri act adopted in practice, there should be served with the order a copy of the writ and petition, as provided in the Missouri statute, it is not necessary to determine, as the parties have appeared and filed motions; but it may be remarked that such additional service is to be preferred, as it gives the party full notice as to what he is to defend.

The motion to set aside the order of service is overruled.

The demurrers of defendants to the bill remain to be considered. The demurrer takes the ground that the court cannot grant the relief asked — *First*, for the want of power in the court over the subject matter; *next*, for want of equity in the bill. Section 8 of the act of congress cited provides for the removal of any "lien or cloud upon the title to real or personal property within the district where such suit is brought." It is argued that there can be no lien or cloud upon the title to property in this case, because there is no property described in the bill, and no decree could be rendered without. This attempted subdivision of the subject

matter in litigation for the purpose of trying the parts is of no avail. Looking at the object of the bill, it mainly seeks to remove a lien or cloud upon her interest in the estate and property of her husband. That this estate passed into the hands of the public administrator, and may have been by him converted into money before this time, can make no difference. The question is, is she entitled to a different share or part of the estate and property of her husband than is provided for in the instrument of writing under which defendants claim, and which she alleges was obtained by deceit and fraud? The jurisdiction over questions of this kind by the courts of the United States, when invoked by a distributee and citizen of another state, has been determined by the supreme court in *Payne* v. *Hook*, 7 Wall. 425, and decisions since.

The instrument sought to be set aside may, with no great impropriety, be called a lien upon the amount for final distribution of the estate of James O. Castello, for the defendants assert their title to the proceeds under it. At any rate, it is a cloud upon her title as long as it stands and is made the basis of claims adverse to her interest. The equity of the bill, assuming the allegation thereof to be true, as the demurrers admit, can hardly be questioned. Here is the wife of a husband whose estate would descend to her, and the brothers and sister of the deceased, there being no will. By deceitful practices and frauds she is induced to sign an instrument depriving her largely of her legal interest. The very statement of the matter calls for interference and redress. Scarcely an object for more proper interference on the part of a court of equity could be conceived of. It should be done in time, before the estate has taken wings and found its way into the possession of wrongful claimants. The administration of the estate in the probate court is not asked to be interfered with, but the way for its proper action is to be cleared, which might have been done by appearing in the court having the estate in charge, but which a non-

resident has a right to have done in the courts of the United States.

The demurrers will be overruled.

McCRARY, *Circuit Judge*, concurs.

Cowan & French, for complainant.

James Scammon, for defendant

NOTE.[1] — NON-RESIDENTS — AS PARTIES. — By section 8 of the act of congress of March 3, 1875, a federal court acquires jurisdiction over parties only by service of process, or by their voluntary appearance (*Herndon* v. *Ridgway*, 17 How. 424; *Stevens* v. *Richardson*, 9 Fed. Rep. 191), and only by service of process within the district (*Allen* v. *Blunt*, 1 Blatchf. 480; *Union Sugar Refi.* v. *Mathiesson*, 2 Cliff. 304,) and not then if he is but temporarily within the district. *Smith* v. *Tuttle*, 5 Biss. 159. A person who comes within the district merely for the purpose of attending a trial in a state court cannot be served with process issuing out of a United States court (*Juneau Bank* v. *McSpeden*, 5 Biss. 64; *Parker* v. *Hotchkiss*, 1 Wall. Jr. 269; *Brooks* v. *Farwell*, 4 Fed. Rep. 166), and if served with summons while attending the trial of a cause in the circuit court as a party, the service will be set aside. *Parker* v. *Hotchkiss*, 1 Wall. Jr. 269. *Contra*, *Blight* v. *Fisher*, Pet. C. C. 41. Where defendant, not an inhabitant of the district, is inveigled or enticed into the district by false representations or deceptive contrivances, service of process on him within the district is illegal. *Steiger* v. *Bonn*, 4 Fed. Rep. 17; *Union Sugar Refi.* v. *Mathiesson*, 2 Cliff. 304. If a non-resident comes into the district for the purpose of pleading to an indictment and giving bail, he cannot be sued before he has a reasonable time to depart. *U. S.* v. *Bridgman*, 8 Am. Law Rec. 541. If defendant is a non-resident of the district, the record most show with certainty that process was served upon him within the district. *Allen* v. *Blunt*, 1 Blatchf. 480; *Vore* v. *Fowler*, 2 Bond, 294; *McCloskey* v. *Cobb*, id. 15; *Thayer* v. *Wales*, 5 Fisher, 448. Where one joint defendant removed the suit, plaintiff is entitled to process against the defendant who was not served with process in the state court at the time the cause was removed. *Fallis* v. *McArthur*, 1 Bond, 100. *Contra*, *Field* v. *Lownsdale*, Deady, 228. See *Fisk* v. *Union Pac. R. Co.* 8 Blatchf. 243; 6 Blatchf. 362. If necessary parties are non-residents, their appearance may be secured under the provision of this section, where there is property within the jurisdiction upon which a lien is claimed. *Mercantile Trust*

[1] From *Federal Reporter*.

Co. v. *Portland & O. R. Co.* 10 Fed. Rep. 604. A marshal's return of "not found" is not a condition precedent to the making of the order contemplated by this section; such order may be made on affidavit alone. *Forsyth* v. *Pierson*, 9 Fed. Rep. 801; *Woolridge* v. *McKenna*, 8 Fed. Rep. 650. The circuit court cannot enforce the lien until it has jurisdiction of the person. *Ins. Co.* v. *Bangs*, 103 U. S. 435. This provision is not a denial of jurisdiction, but the grant of a privilege to defendant not to be sued out of the state where he resides unless served with process, or waives his privilege by voluntary appearance. *Harrison* v. *Bowan*, Pet. C. C. 489; *Segee* v. *Thomas*, 3 Blatchf. 11. The successor in a deed of trust is a proper party defendant in a suit to adjudge the deed a subsisting lien, and he may be brought before the court under this section. *Mass. Mut. L. Ins. Co.* v. *Chicago & A. R. Co.* 13 Fed. Rep. 857. The circuit court has jurisdiction to adjudicate upon the claims of parties not found within the district, if they have been notified by service or by publication of the pendency of the suit. *Goodman* v. *Niblack*, 102 U. S. 556. Foreign corporations are found within the district when process is served upon their duly-constituted agent in charge of their business. *McCoy* v. *C. I. St. L. & C. R. Co.* 13 Fed. Rep. 3; *Mohr* v. *Mohr Dist. Co.* 12 Fed. Rep. 474.—[ED.

MICHELS *v.* OLMSTEAD.

(Western District of Missouri. October, 1882.)

1. EVIDENCE — PAROL MERGED IN WRITING — COLLATERAL MATTER OR CONDITION.—When parties, without any *fraud* or *mistake*, have deliberately put their engagements in writing, the law declares the writing to be not only the *best* but the *only evidence* of the agreement; but this does not prevent parties to a written agreement from proving that either contemporaneously or as a preliminary measure they had entered into a distinct oral agreement on some collateral matter, or an oral agreement which constitutes a condition on which the performance of a written agreement is to depend.
2. FRAUD NOT PRESUMED.— Where a defense of fraud and deceit is set up the law will presume that the plaintiff acted honestly and in good faith until defendant has clearly proven the contrary.

KREKEL, *District Judge (charging jury).*— The plaintiff, Jacob Michels, sues George P. Olmstead on an agreement in writing which stipulates for machinery to be furnished by

plaintiff to the defendant at specified prices. The law favors written agreements between parties to a contract because they are supposed to decrease the liabilities for misunderstanding. It is presumed that when a written agreement is entered into that it contains the whole of the conditions and undertakings of the parties to the contract. The supreme court of the United States has had this matter under consideration lately, and I quote from its decision so much as will show the views taken of written contracts. Chief Justice Waite, in *Bast* v. *Bank*, 101 U. S. 96, says:

"When parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best but the only evidence of the agreement, and we are not disposed to relax the rule. It has been found to be a wholesome one, and now that the parties are allowed to testify in their own behalf, the necessity of adhering strictly to it is all the more imperative."

The contract read in evidence must be taken to set out the whole of the agreements of the parties, and no change of it can be made by verbal testimony unless the instrument itself shows on its face that certain matters pertaining to it are left undetermined, and when this is the case testimony may be admitted to complete the contract, so to speak.

In the quotation made from the opinion of the supreme court of the United States there are two exceptions stated to the law regarding written agreements between parties, and these are fraud and mistakes. To bring the defenses made by the defendant within this rule, he has set up in his answer certain acts and doings of the plaintiff, claiming them to be frauds upon him. It is alleged by the defendant that he was entirely ignorant of the value of the machinery for which he contracted, and that he relied on the plaintiff for the reasonableness of the charges, and plaintiff was thus enabled to deceive and did grossly deceive him regarding the cost of the articles. A manufacturer, under such circumstances, if satisfactorily proven, is bound to make

reasonable charges; but as nearly all articles contracted for vary in prices in different manufacturing establishments, no definite rule can be laid down as to prices, and unless they are found to be grossly exorbitant the agreement made regarding them must stand. In the attempt to arrive at a conclusion as to such charges as by their grossness amount to a fraud, you will take into consideration the knowledge the defendant had of the value of such articles and the means at hand to inform himself regarding such. If he failed to exercise due caution, was careless or neglectful of his interest, he cannot, in his defense, set up his own shortcomings. This, however, affects the amount of damages only, and if plaintiff is found entitled to any damages, such an amount will be allowed him as will give him reasonable profits, estimating the original cost at the usual prices. If the machinery was to be furnished at cost, he is entitled to nominal damages only.

Another defense is that the so-called dry process by which syrup may be produced from corn is valueless, and that a marketable article cannot be produced thereby, and that the defendant was thus imposed on. The testimony on this branch of the case is conflicting, and it is here where the guaranty made by the plaintiff in the contract sued on, that the process named will not only produce a merchantable article, but also in certain quantities from a given amount of corn, is of avail to the plaintiff. Under his part of the contract the defendant has a right that the means of practically testing the process, if not already satisfactorily done, should be furnished. The defendant has chosen in this particular to rely on his guaranty, and might have secured himself in the contract against losses having their origin in a defect of the process; and unless you shall find from the testimony that the dry process is utterly worthless for the production of a merchantable article of syrup, you should find the issue on this branch of the case for the plaintiff.

If you shall find from the testimony that fraud and deceit were practiced by plaintiff Rogers or Stebbins regarding the dry process, and the defendant was thereby induced to enter into the contract, which he would not have done but for such fraud and deceit, such fraud and deceit vitiate the contract, and the defendant is relieved of any obligation incurred thereby. It will be remembered, however, in the consideration of the question of fraud, that the law abhors it, and will not attribute the commission thereof to any one, but, on the contrary, presumes that the action of the plaintiff was honest and fair. Moreover, the defendant sets up the frauds regarding the gross excess of prices charged for machinery, the frauds and deceits practiced in reference to the utility of the dry process, and he, the defendant, is held to establish these frauds on the part of the plaintiff or his confidant to your satisfaction. As already stated, the law presumes that the plaintiff acted honestly and in good faith in entering into the contract in evidence; and unless the defendant has shown to your satisfaction that he acted fraudulently in fact, you must find the issue made as to frauds and deceits for the plaintiff.

To another branch of the case I now proceed to call your attention. The written contract itself refers to, and verbal testimony is introduced to show that defendant contracted with reference to the organization of a corporation which was to assume the obligation which he incurred by virtue of entering into the contract read in evidence, and he, the defendant, claims to be released from his obligation because such a corporation was not organized. The question here is, did the defendant enter into a binding agreement at all? You will remember what was said about the binding obligation, the solemnity of a contract, and the presumptions of law that the whole of the matters pertaining to the contract must be assumed to have been stated therein. This, however, does not touch upon or exclude the defendant from

showing the conditions under which the contract was signed. Law writers have expressed the idea sought to be conveyed in the following language:

"The denial of explaining a contract by verbal testimony does not prevent parties to a written contract from proving that either contemporaneously or as a preliminary measure they had entered into a distinct oral agreement on some collateral matter. Still less does it exclude evidence of an oral agreement which constitutes a condition on which the performance of the written agreement is to depend."

Or, as another writer expresses it:

"The first question to determine in construing a document is whether there is a document to construe. Hence it is always admissible to show by parol that a document was conditioned on an event that never occurred."

Thus, in the case before you, if you shall find from the testimony that Olmstead signed the contract sued upon with the full definite understanding by both Michels and himself that he, Olmstead, was not to be liable, personally, in the event no corporation was formed, he is not bound by the contract, and you will so find by your verdict. With the $46,000 contract which was to be carried out by Olmstead himself in case of the failure of the two thousand bushel house, of which mention was made, you have nothing to do, the plaintiff not having sued thereon.

In case you find the issues for plaintiff, you will state the amount allowed him. If you find the issues for the defendant, you will so state in your verdict.

Tichenor & Warner, for plaintiff.

Peak & Yaeger, for defendant.

Beaulieu & Allen *v.* City of Pleasant Hill.

(Western District of Missouri. October, 1882.)

1. Mandamus to Compel Payment of Debt of Municipal Corporation — Return.— The return to an alternative writ of *mandamus*, issued against a city to enforce the payment of a judgment, must show that the city has exhausted its power in the levy and collection of taxes under power conferred upon it by its charter and its amendments, and that the revenues so collected have been properly applied.
2. Municipal Corporation — Creditor Taking Bond — Remedy.— A creditor taking a bond of a municipal corporation whose taxing power at the time of the issuing of the bond was and still is limited, and providing that the bond and interest shall be paid out of the yearly revenue of the city, cannot insist on remedies beyond the limitation, but may insist on the full and proper exercise of such power within the limitation.

Krekel, *District Judge.*— Relators Beaulieu & Allen recovered judgment in this court against respondent, the city of Pleasant Hill, in 1881, for the sum of $4,620. Failing to obtain satisfaction, they sued out an alternative writ of *mandamus*. The bonds, upon the coupons whereof the judgment was obtained, were issued by the city of Pleasant Hill to consolidate the floating debt of the city, under authority of an act of the legislature of Missouri amending its charter, passed in 1871. The bonds on their face recite that they were issued pursuant to section 12 of the amending act, and an ordinance of the city of Pleasant Hill providing for the payment of the floating debt of the city. The twelfth section of the amendment, providing for the consolidation of the floating debt and authorizing the issuing of bonds, in reference to them says they "shall bear interest at the rate of ten per cent. per annum, payable semi-annually at the office of the city treasurer of the said city, which said interest shall be provided for and paid out of the yearly revenue of said city, and the principal of said bond may be paid out of the yearly revenue of said city."

The original charter of the city of Pleasant Hill, passed in

1859, provided in section 8 for the levy of taxes on real and personal property not to exceed one-fourth of one per cent. This section was amended in 1868, providing that the members of the council "shall have power by ordinance to levy and collect a tax not exceeding one dollar in any one year on all male inhabitants of the city of Pleasant Hill of the age of twenty-one years and not over fifty years; also to levy and collect taxes on all real estate and personal property in said city subject to taxation by law, not exceeding one per cent. on the assessed value thereof." This power, with its limitation regarding the levy and collection of taxes, was in force when the charter amendment of 1871 was passed. It did not in any way interfere with the limitation, but extended the power of taxation to the licensing and taxing of merchants, retailers, taverns, billiard tables, pigeon-hole tables, bagatelle tables, ten-pin alleys, and other gambling devices, hackney carriages, wagons, carts, drays, pawnbrokers, hawkers, peddlers, restaurants, eating-houses, livery stables, theatrical performances, circuses and shows of whatever kind, singing concerts, and other amusements in said city; to levy and collect tax on dogs in said city; to tax, license and regulate dram-shops and tippling-houses and saloons; to tax auctioneers; to impose fines, forfeitures and penalties for breaches of city ordinances.

When the court issued its mandate directing the city council of Pleasant Hill to levy a tax to pay relators' judgment, or show cause why it refused so to do, any showing of cause for refusal, if based upon the want of taxing power, should show that all taxes authorized by law had been levied, collected and properly applied. Instead of such showing the amended return made is that one per cent. has been assessed and collected on all real and personal property of the city, and that the amount thereof, $3,500, has been expended in city expenses, except about $1,500, which have been used in buying up judgments against the city; that the assessed value of the real and personal estate and merchandise for 1882 is

$409,000. The remaining part of the return consists of statements of the large indebtedness of the city and its inability to pay dollar for dollar; that the city has sought to compromise its indebtedness, and offered to do so with relator, without success.

The city of Pleasant Hill, aside from the right to tax all property made taxable by law, has power to levy taxes on persons and various occupations, collect fines and impose penalties, as pointed out in the quotations from its charter, which power to tax, taking the return to be true, it has not exercised. It is not the proper answer to the mandate of a court to show that a partial tax has been levied and the proceeds thereof expended in city expenses and the purchasing of judgments. The court is entitled to know what are the full resources of the city, and whether they have been called into requisition, and how the revenues are expended. In the language of the twelfth section of the amended charter of 1871, the interest on the bonds issued under it "shall be provided for and paid out of the yearly revenue of said city," so that none of the revenue of the city can be used and employed for other than ordinary purposes, so long as creditors have a claim thereon. The purposes for which the ordinary revenues may be applied are pointed out in the law, and they must be applied accordingly.

On the other hand, it would seem that a creditor taking a bond of a municipal corporation whose taxing power at the time of the issuing of the bond was and still is limited, cannot insist on remedies beyond the limitation, but, as stated, may insist on the full and proper exercise of such powers within the limitation. This construction does not conflict with the provision of the execution law of Missouri giving authority to courts to compel municipal corporations by *mandamus* to levy a tax to pay unsatisfied judgments. There is application for this provision in cases where no limitations as to taxation exist, as well as within the limitations, as in this case. The power of taxation is a legislative power, and

cannot be inferred. Except in cases where a denial would work injustice, as authorizing the creation of liabilities, implied power may be inferred to raise the means for their satisfaction. In the case under consideration the city of Pleasant Hill had a floating debt, for the consolidation and settlement of which by way of bonds the legislature sought to provide. The creditor had choice between the evidence of debt possessed of and the new instruments provided. In the instance before us the creditors preferred the bonds, and took them under the limitations the law provides. It is no hardship to hold them to their choice, which may be presumed to have been wisely made. These views find support in the *Macon Co. Case*, 99 U. S. 589.

The case under consideration differs from *Britton* v. *Platte City*, 2 Dill., in this: that there is a provision in the Pleasant Hill act which requires the interest on the bonds to be paid out of the yearly revenues of the city. It is this provision which takes it out of the statutes of Missouri providing for payment of municipal debts and punishing neglects, and out of the rulings in the *Louisiana Case*, 103 U. S. 289, and the *Butz Case*, 8 Wall. 575.

The conclusions arrived at are that the return to the alternative writ of *mandamus* is insufficient, in its failing to show that the city council of Pleasant Hill has exhausted its power in the levy and collection of taxes under power conferred upon it by the charter of the city and its amendments, and by its failing to show the proper application of the revenues collected. Unless the return is amended in conformity to the views expressed, a peremptory writ of *mandamus* will issue directing such an amount of the revenue of the city to be levied, collected and paid to relator as the court shall deem not oppressive.

McCrary, *Circuit Judge*, concurs

Mr. Cockrell, for relators.

Whitsett & Comingo, for respondent.

Arn *v.* City of Kansas.

(Western District of Missouri. October, 1882.)

1. Surface Water — Injury from Diverting.—The law regarding surface water is that no individual or corporation can make any change thereof to the injury of any one without being responsible in damages for such injury.
2. Municipal Corporation — Increasing Flow of Surface Water.— If a city constructs a sewer in such a manner that an *additional* flow of surface water into a lot is caused thereby, the owner of such lot may recover such damages as may have been caused by such *increased* flow.
3. Same — Constructing Sewers — Injury to Property.— A city, in the progress of constructing its sewerage, is not responsible for any depreciation in the rental value of property caused by the bad smells of a sewer in course of construction, unless it is kept open an unreasonable length of time.

Krekel, *District Judge (charging jury).*— The plaintiff, Arn, brings this suit to recover of the city of Kansas damages for the diminution of the rental value of a house and lot situated at the junction of Nineteenth and Main streets, caused by the foul and filthy discharge of a sewer upon part of the plaintiff's premises, and for the washing away of the soil of part of the lot, thereby damaging the lot itself. It appears that a certain territory now within the city limits of Kansas City naturally drains its surface water across Main street and into a lot adjoining the lot of plaintiff, from which it passes in its natural flow into the lot of plaintiff. It further appears that in 1877 the city of Kansas constructed a culvert across Main street to improve the street, and secure a proper passage over it of the surface water flowing at the place of constructing the culvert. And it still further appears that in 1880 the progress of the city made it necessary to construct a sewer from Walnut street along Eighteenth to Main street, and thence along Main street into the culvert before spoken of, making the culvert

a part of the sewer which is now extended into Nineteenth street, thence west and parallel to plaintiff's lot.

The matter in dispute is, *first*, the location of the culvert, it being contended on the part of plaintiff that it is not located in the place of the old drainage, but that the location has been so made as to change the flow of the surface water, thereby causing the water to wash away the soil and injure the value of the lot itself, as well as the rental of the premises. The law regarding surface water is that no change thereof can be made to the injury of any one. No individual or corporation can make such change, and if it is done, and injury is incurred thereby, the wrong-doer is responsible in damages. You are therefore instructed that if you shall find from the testimony that the defendant, the city of Kansas, has constructed the sewer in question, not along the ancient drainage, but so diverted the natural course of the water as to change the force and effect of the flow that the soil of plaintiff's lot was washed away, you should find this issue for plaintiff, and allow him such damage as plaintiff has sustained thereby. But if the jury shall find from the evidence that the sewer in controversy was constructed upon the ancient flow of the water, they should find this issue for the defendant. It is an indisputed fact that the water flowing through the sewer along Eighteenth street from Walnut to Main, and down Main street, carries off a part of the surface drainage which formerly flowed across Main street, at or near the place of the location of the culvert. But it is contended that by virtue of the improvements along Eighteenth and Main streets an additional amount of water is discharged into this sewer, and that such additional water increased the flow of water into plaintiff's lot, and injury resulted therefrom. Regarding this additional flow of water, if such has been shown to exist, you are instructed that plaintiff has a right to recover such damage as has been done by it to his lot. It is the damage done by the water which may have been added by virtue of the sewer

spoken of, and not for the whole water; in other words, if the sewer gathered other than surface water, and damages were done on account of such increase of water, plaintiff may recover such damages.

We now come to the injury which is claimed to have resulted from the discharge of nauseating and filthy water and deposits, affecting the rental value of the premises. Regarding this you are instructed that the city of Kansas, in the progress of constructing its sewerage, is not responsible for the bad smells of a sewer in course of its construction, unless kept open an unreasonable length of time. The reasonableness of the time is to be judged of by the circumstances testified to. If you shall find from the testimony that the sewer testified to was left an unreasonable time in the condition it was, and in consequence of the bad smells thereby created the plaintiff could not rent his house at what it was really worth, you will allow him the difference between the real rental value and the rent he received, and this for the length of time the sewer was left open and plaintiff sustained damages in consequence thereof. As to the washing away of the soil of plaintiff's lot you are instructed that if you shall find from the testimony that an increase of flowing water was caused by the sewer run into the culvert, and that such increase of water contributed to the washing away of the soil of plaintiff's lot, you will allow him such damages on that account as will compensate him for the restoration of the lot to the condition it would have been in had such additional flow of water not taken place.

In your verdict, if you find for the plaintiff, you will find the damages sustained on account of rental value and on account of damages to the lot separately, and then state the whole of the damages allowed. If you find the issues for the defendant, you will so state.

Bouscaren & Kenyon, for plaintiff.

Mr. Twitchell, for defendant.

Mosgrove and others *v.* Kountze and others.

(District of Nebraska. November, 1882.)

1. Equity — Practice — Supplemental Bill. — Leave will not be granted after decree to file a supplemental bill for the purpose of setting up matters which might, by the use of due diligence, have been ascertained, and pleaded by way of amendment in the original suit.
2. Same — Changing Parties. — The fact that the complainant desires to drop out of the case some of the parties defendant to the original bill does not of itself give him the right to proceed by supplemental bill, especially when it appears that such change of parties is not essential.
3. Removal of Cause — Jurisdiction of Circuit Court. — A circuit court of the United States has no jurisdiction of a case commenced in a state court on a contract by an assignee, and removed thence to said court, unless the action might have been brought originally in the circuit court by the assignor, and it is probable that a plea to the jurisdiction would be entertained in a supplemental proceeding.

Application for leave to file a supplemental bill.

It appears from the record that about the year 1877 John I. Redick recovered a judgment in the district court for Douglas county, Nebraska, for about $2,500 against the Omaha & Northwestern Railroad Company, which judgment was afterwards assigned to one James E. Brown, who commenced a suit in equity in the district court of Burt county, Nebraska, against John A. Horback, Henry W. Yates, Herman Kountze, Francis Smith, Frank Murphy and Sally A. Horback, for the purpose of subjecting to the payment of said judgment certain real estate in the bill described.

The ground of the action was that the said respondents, some of them being directors of said railroad company, had entered into a contract with the company to construct a portion of the line of railway, which contract was contrary to public policy and void, and that they had received the land sought to be subjected as a part of the proceeds of said contract, and therefore held it in trust for the creditors of said

company. It was in the original bill averred that the respondents had received under said contract, besides the real estate then sought to be subjected, about $45,000 in Burt county bonds and some $16,000 per mile in bonds on the line of the railroad constructed, being about $112,000, which they had converted to their own use; but it was not sought by the original bill to do more than subject the real estate to the payment of said judgment.

Pending said suit said James E. Brown departed this life, and the present complainants were substituted as his administrators.

A decree was rendered in favor of the complainants which reserved their right, in case the real estate should not sell for sufficient to pay the judgment, interest and costs, to apply to the court for further relief in the premises. Complainants ask leave now to file a supplemental bill for the purpose of subjecting the personal property still remaining in the hands of said respondents as the proceeds of said illegal contract to the payment of the balance which is alleged to be due upon said judgment. This personal property is said to consist of the bonds and stock received by respondents as the fruits of said contract or proceeds thereof, amounting to between $75,000 and $80,000.

The grounds upon which this leave is asked, as they appear in the supplemental bill, are, in substance, as follows:

(1) That it has been ascertained, since the filing of the original bill, that all the respondents in said original bill are not directors and trustees of said railroad company, and that the prayer of said original bill was not broad enough and sufficient to grant complainants such relief as has since been shown they were entitled to. (2) That it has since appeared by proof, and on trial of said cause, that the respondents hold in their possession the bonds above mentioned as the fruits of the contract above referred to. (3) That the complainants had no means of knowing, and did not know, at the time of the filing of the original bill, that the respondents

held in their possession the proceeds of said bonds, which they had converted to their own use.

It is insisted by respondents that it appears from the record that the facts set forth in the supplemental bill might have been ascertained and pleaded by way of amendment to the original bill.

Redick & Redick, for complainants.

J. D. Howe, for respondents.

McCRARY, *Circuit Judge.*—It is well settled that leave will not be granted, after decree, to file a supplemental bill for the purpose of setting up matters which might, by the use of due diligence, have been ascertained and pleaded by way of amendment in the original suit. This is conceded by the learned counsel for complainants, but they deny that there is anything in the record which was sufficient to bring home to complainants notice of the facts now averred, in time to have presented the same by way of amendment to the original bill. By reference to the foregoing statement it will be seen that the original bill itself alleged, among other things, that the respondents therein had received $45,000 in Burt county bonds, and $16,000 per mile in bonds on the line constructed, being about $112,000, which they have converted to their own use. It thus appears that at the time of filing the original bill the complainants had information which would have enabled them to pursue and subject the personal property, as well as the real estate, which defendants had received under said contract. It is said in answer to this suggestion, and it is in fact elsewhere alleged in the supplemental bill, that the complainants did not know, at the time of the filing of the original bill, that the respondents held the proceeds of said bonds, which they had converted to their own use, but the allegation of the original bill was precisely to this effect. It is there distinctly averred that the defendant held all the property received upon said contract

in trust for the railroad company, the contract under which they obtained it being null and void.

It follows, therefore, that, even if we do not look beyond the allegations of the original bill, we have ample proof that the fact sought to be set up by way of supplemental bill was or might have been known to the complainants at the time the original suit was commenced. But, as already stated, it is sufficient if it appears that the facts sought to be set up by way of supplemental bill were known in time to have been presented by way of amendment to the original bill. It is not enough that they were not known when the original bill was filed.

By reference to the answer filed in the original cause it will be seen that the facts concerning the contract, and the receipt thereunder by defendants of the land, and of the county and railroad bonds above mentioned, were fully disclosed, and there is no allegation that the defendants had paid the same over to the railroad company, or had any purpose to do so. On the contrary, it appeared from the face of the answer, beyond question, that the defendants held said property, including both real estate and personal property, claiming the right to it, and denying any liability on their part to pay it over to the railroad company. In other words, the theory of their defense was that they did not hold it as trustees for the railroad company. The answer disclosed the fact (which appears to have been known to the complainants when the original bill was filed) that the defendants held the personal property received under said contract in precisely the same way that they held the land, and thus the complainants were informed that they had the same right of recovery as to both. It appears, therefore, that the complainant chose to proceed against the real estate alone, doubtless upon the expectation that it would be entirely sufficient to satisfy his judgment. If in this he was mistaken, it does not by any means follow that he can at this late day file a supplemental bill in the same case for the purpose of

reaching other and different property. The fact that the complainant desires to drop out of the case some of the parties defendant to the original bill does not of itself give him the right to proceed by supplemental bill.

It does not appear that the plaintiff's right of recovery as to the personal property rests upon any different ground from that upon which he proceeded against the real estate. Therefore, the fact of his recovery in the original suit shows that a change of parties was not and is not essential.

I am of the opinion that the facts set forth in the supplemental bill in this case were sufficiently disclosed in the original bill and answer to have enabled the complainants to set them up by way of amendment before the replication in the original suit, and that, therefore, they cannot be presented now by way of supplemental bill; besides, it is clear that under the twenty-ninth rule in equity the court would have granted leave to amend even after replication in such a case as this. These considerations relieve the court from the necessity of considering a question of jurisdiction which might otherwise arise. It has been repeatedly held in this circuit that this court has no jurisdiction of a case commenced in a state court on a contract by an assignee and removed thence to this court, unless the action might have been brought here originally by the assignor.

It is probable, I think, that, although it is now too late to raise the question as to the validity of the original proceedings and decree, the question of jurisdiction might be raised upon a supplemental bill, seeking to enlarge and extend the relief prayed, so as to include other property. The general rule is that a question of jurisdiction may be raised at any time, and as the original proceeding was wholly concluded, and a final decree rendered and fully executed, it seems probable that a plea to the jurisdiction would have to be entertained as against any supplemental proceedings. It is not, however, necessary to consider this point, nor even to determine whether the plea to the original bill would have

been good, as the present application must be disposed of on the other ground above discussed.

Let the order granting leave to complainants to file a supplemental bill be set aside, without prejudice to their right to bring an original bill for the same purpose.

GUINN *v.* IOWA CENT. R'Y CO.

(Southern District of Iowa. 1882.)

1. CORPORATION — JURISDICTION. — The "principal place of business" of a corporation is no test of residence, whether of a corporation or of a natural person, as a person may reside in one state and have his principal or sole place of business in another state.

LOVE, *District Judge.*— The principle laid down in the case of *McCabe* v. *Ill. Cent. R. Co.* 4 McCrary, 492, is decisive of the present case. The defendant is an Iowa corporation, having its principal place of business at Marshalltown in the central division of the district of Iowa. Process was served upon its agent, C. M. Miller, at the town of Albia in the southern division, returnable at Keokuk. The late act of congress, creating circuit court jurisdiction in the several divisions of the district of Iowa, provides, in substance, that suit shall be brought in the division in which the defendant has his residence. The defendant herein now moves to have the cause transferred to the central division, on the ground that the residence of the defendant is at the principal place of business, which is in the central division. In addition to what is shown in the case of *McCabe*, *supra*, it may be said that the "principal place of business" is no test of residence, whether of a corporation or natural person. A natural person might reside in one state and have his principal, or, for that matter, his sole place of business in another state. I presume that thousands of persons reside in Jersey City and have their principal place of business in New York, and

many, no doubt, reside beyond the limits of the state of New York, and carry on their *sole* business in the city of New York.

The motion is denied.

Trimble, Caruthers & Trimble, for plaintiff.

H. E. J. Boardman, for defendant.

Nichols *v.* Horton.

(Northern District of Iowa, Eastern Division. December, 1882.)

1. Privilege of Witness — Exemption from Service of Civil Process. — Defendant, while in attendance as a party and witness upon the trial of a case in Howard county, Iowa, by telegram directed and instructed the sheriff of Mower county, Minnesota, to seize by writ of attachment the goods of plaintiff, whereupon plaintiff immediately brought suit for the wrongful taking thereof, and served defendant with notice of the commencement of such suit. *Held*, that defendant could not protect himself from responding to the action brought against him by the alleged owner of the property, under the privilege usually accorded to witnesses and parties in attendance upon a trial of a cause in court.
2. Same — Exception to Rule. — Where parties or witnesses, while in attendance upon the trial of a cause, including going to and returning from the place of trial, do no wrong or injury to third parties, they may claim exemption from service of civil process; but where they lay aside the character of parties or witnesses, and for their own behalf and benefit give cause for the institution of actions against them by third parties, they cannot invoke this privilege, but must be deemed to have waived the exemption. The trial upon which the party or witness is in attendance must not, however, be interfered with by such service.

This action was commenced in the circuit court of Howard county, Iowa. The defendant is, and was at the time of the beginning of the action, a resident and citizen of Minnesota. Service of the original notice was had upon defend

ant at Cresco, Howard county, Iowa, on the fourteenth day of April, 1882.

The petition alleges that plaintiff is the owner of certain personal property; that the same was in his possession; that while he (the plaintiff) was removing said property to Dakota territory it was levied on by the sheriff of Mower county, Minnesota, by virtue of a writ of attachment issued from the district court of Olmsted county, Minnesota, in an action wherein the present defendant is plaintiff and William O. and W. Nichols are defendants; that such levy was for the benefit of the defendant herein, and was made by his express directions; that such levy and taking possession of said property were wrongful and to the great damage of plaintiff.

At the September term, 1882, of the circuit court of Howard county, to wit, on the twenty-sixth day of September, being the second day of the term, the defendant filed a petition for the removal of the cause into the federal court, which petition was granted, and the cause has been duly filed in this court. The defendant took no action in the state court save only the filing of the proper petition and bond for the removal of the cause into this court.

On the first day of this term of this court, and as soon as it could be done after the removal of the cause, the defendant filed a motion to quash and set aside the notice and the service thereof upon defendant, being the notice served in the state court upon defendant, notifying him of the commencement of the action, for the reasons that, when said notice was served upon him, the defendant was a resident and citizen of Minnesota; that he was in Iowa only temporarily, and for the sole purpose of attending as a party and witness upon the trial of a suit then pending in the court of Howard county, Iowa, and that service of the notice was made on him while he was in Iowa for the above purpose, and before the cause upon which he was in attendance was heard; that being thus in attendance upon the court as a

party and witness, he was privileged from being served by legal process in a civil action.

It is shown by the affidavits filed in connection with this motion that the defendant went to Cresco, Iowa, on or about the tenth or eleventh of April, 1882, for the purpose of attending the trial in the cause then pending at that place; that previous to going to Iowa, and about the eighth day of April, he instituted an action in Olmsted county, Minnesota, against William O. and W. Nichols, and sued out a writ of attachment therein, and caused the same to be placed in the hands of the sheriff of Mower county, with instructions to levy the same upon the property which was subsequently taken by the officer; that he instructed the officer to keep watch for said property, and informed him that he was going to Iowa, and that he would endeavor to ascertain when the property would be shipped from Iowa through Minnesota, and would notify the sheriff by telegraph of the facts, in order that the sheriff might make the levy; that while the defendant herein was at Cresco, Iowa, to wit, on the eleventh day of April, the defendant sent a telegram to the sheriff of Mower county, notifying him that the property was in transit, and to make the levy; that this telegram was not received until the next day by the sheriff, who had already found the property, and executed the writ of attachment by taking possession of the property; that on the thirteenth and fourteenth days of April the defendant sent telegrams to the sheriff of Mower county directing him to hold the property under the writ of attachment.

Under this state of facts it is urged in behalf of plaintiff that the privilege claimed, of exemption from service of process in a civil action when in attendance upon another court as a party and witness, does not properly apply; and further, that it is now too late to assert the claim, for the reason that the defendant did not make the claim in the state court, but simply appeared generally in the action, and filed a petition for removal into this court upon the ground that

there was a controversy pending between the parties in which the amount involved exceeded $500.

H. C. McCarty, for plaintiff.

Reed & Marsh, for defendant.

SHIRAS, *District Judge*.— The general principle that parties, witnesses and jurors are privileged from service of legal process in civil actions while in good faith they are in attendance upon the hearing of a cause in court is well recognized by the authorities, and in the case of parties and witnesses this exemption from service of process extends to the taking of testimony before a master or commissioner preparatory to the final submission of the cause to the court. In point of time, the privilege exists during the time fairly occupied in going to and returning from the place of trial or hearing, as well as during the time when the party is in actual attendance at the place of trial. See *Brooks* v. *Farwell*, 2 McCrary, 220; *Juneau Bank* v. *McSpedan*, 5 Biss. 64; *Bridges* v. *Sheldon*, 7 Fed. Rep. 17; *Plimpton* v. *Winslow*, 9 Fed. Rep. 365; *Lyell* v. *Goodwin*, 4 McLean, 29; *Person* v. *Grier*, 66 N. Y. 124; 1 Greenl. Ev. §§ 316, 317.

Although this rule came into existence at a time when, in civil causes, the defendant might be arrested and held in custody to answer the writ unless bail were given, and although that fact had doubtless great weight in bringing about the adoption of the rule, as it is manifest that if a party, juror or witness attending upon one cause could be arrested in another and kept in custody, it would impede and possibly defeat the proper disposition of the cause on trial, yet this was not the sole or only reason for the adoption of the rule in question. If it had been the sole reason for the rule, then, upon the abolition in any state of the right to arrest a defendant in a civil cause, the rule itself might be deemed to have been thereby abrogated. Experience, however, has shown that in order that causes may be

fully heard, and the orderly administration of justice may be assured, it is necessary that parties, witnesses and jurors shall be protected against service of process in civil actions while they are in good faith in attendance upon the trial of causes. If parties or witnesses are liable to be sued when in attendance upon the court in which the cause with which they are connected is pending, and by reason thereof they may be compelled to appear and answer in a foreign tribunal or in one different and far distant from that wherein they could alone have been sued, had they not been in attendance upon the court, the fear thereof might well deter them from attending at the place of trial; and if they were beyond the reach of a subpœna, a party might, as a consequence, be deprived of the personal presence and testimony of witnesses whose absence would be fatal to his cause.

Without, however, endeavoring to give all the reasons why the privilege in question is still recognized and enforced in states under whose laws no arrest of the person can be made, as part of the process for the institution of civil actions, it is sufficient to say that the rule exists and is in force, and in all cases coming within its reason and true purpose this court will not hesitate to enforce it. Is it, however, a rule without exception, to be rigorously enforced in every case without reference to circumstances? Suppose a party or witness is in attendance upon a trial in a given case, and while so in attendance he wrongfully takes or injures the property of a third person, or inflicts bodily injury upon him, is such third person to be debarred from bringing an action at once against the wrong-doer, because he happened to be a party or witness in some cause then pending for trial, but with which the third person has no connection? Suppose a party or witness comes from a distant state, or possibly from a foreign country, to attend upon a trial, and while on his journey he commits a wrong, is the party thus injured obliged to submit to the wrong and postpone the bringing of an action for redress until the wrong-

doer has returned to his home, which, as suggested, may be in a foreign country, or, if in the United States, may be so far distant as practically to defeat all remedy if the injured party is obliged to follow him to his home? Suppose a party or witness, when in attendance upon a trial, becomes indebted to a hotel-keeper for his board, or to a merchant for goods purchased, to be paid for on delivery, and the debtor refuses to pay his just debts thus contracted, are the creditors powerless in the premises, and are they to be compelled to await the return of the debtor to his own home before they can invoke the protection of the law? If such a rule should be upheld, would it not be enabling parties and witnesses to perpetrate wrongs upon third parties, and then to escape responsibility by invoking the privilege attaching to their character as parties or witnesses in pending litigation, thus converting that, which was originally intended as a shield for their protection, into a weapon of offense, to the injury of innocent third parties? Where the parties or witnesses, while in attendance upon the trial, including going to and returning from the place of trial, do no wrong or injury to third parties, they may claim the protection of the privilege of exemption from service of civil process; but where they lay aside the character of parties or witnesses, and for their own behalf and benefit give cause for the institution of actions against them on behalf of third parties, then it would seem just to hold that they cannot invoke the privilege in question, but that by such action on their part they must be deemed to have waived the exemption. In the exercise of the right of bringing suit in such cases, it would be the duty, however, of such third party, in instituting his proceedings for the protection of his rights, to see to it that he does not in fact interrupt the trial of the cause upon which the party or witness is in good faith in attendance.

In the case at bar, it appears that the defendant herein, when served with the notice for the commencement of the action, was in attendance upon the trial of a cause in Howard

county, Iowa; that while in said county the sheriff of Mower county, Minnesota, by his direction and express authority, levied a writ of attachment upon the property of the plaintiff herein, this being done on the eleventh day of April, 1882. The wrong complained of was not committed until that day, and the cause of action did not arise until that time, and as the evidence shows that the defendant was on that day sending directions to the sheriff to aid him in seizing the property, it must be held that he was an active participant in the taking of the property, and that he cannot protect himself from responding to the action brought against him by the alleged owner of the property, under the privilege usually accorded to witnesses and parties in attendance upon a trial of a cause in court.

There was no claim made that the mere service of the notice on defendant, requiring him to appear and answer at the September term of the court, the service being made in April, in any manner interfered with the trial of the cause then pending and upon which the defendant herein was then in attendance.

Upon the facts disclosed on the record, we hold that the motion to quash the notice and service thereof must be overruled, and it is so ordered.

Field, Adm'r, *v.* Chicago, B. & Q. R'y Co.

(District of Iowa. 1882.)

1. Highway Crossings on Railroads — Negligence — Personal Injuries. — The liability of a railroad company for death or personal injuries caused by the neglect of the company to put up at highway crossings the sign-board to warn travelers along the highway of danger from the proximity of the railroad train, does not attach absolutely under the statute where it appears the damages sustained were the result of the injured party's own negligence, and were not caused by the absence of the sign-board.

2. SAME — STATUTE CONSTRUED — SIGN-BOARDS AT CROSSINGS. — The intention of the statute was not to create an absolute liability on the part of the railroad company, but to make the failure to provide sign-boards at highway crossings conclusive evidence of negligence on the part of the company.

This action is before the court on motion for a new trial on the ground of misdirection to the jury as to the law of the case. Plaintiff's intestate was killed by a moving train while attempting to cross defendant's road with a team at a public crossing. The statute of Iowa, § 1288, requires a sign-board to be set up at public crossings as a warning, and plaintiff claimed that the neglect to set up such sign-board at the highway crossing where the injury occurred made the defendant absolutely liable under the statute, and requested the court to charge the jury to that effect, which the court refused. The question was upon the construction of the statute, which is as follows:

SEC. 1288, Code of Iowa. "Every corporation constructing or operating a railway *shall make proper cattle-guards* where the same enters or leaves any improved or fenced land, and construct at all points where such railway crosses any public highway, good, sufficient *and safe crossings and cattle-guards*, and erect at such points, at a sufficient elevation from such highway to admit of free passage of vehicles of every kind, a sign, with large and distinct letters placed thereon, to give notice of the proximity of the railway and warn persons of the necessity of looking out for the cars; and any railway company neglecting or refusing to comply with the provisions of this section *shall be liable for all damages sustained by reason of such neglect and refusal*, and in order for the injured party to recover it shall only be necessary for him to prove such neglect and refusal."

William McNett, *John A. Shank* and *Barcroft & Gatch*, for plaintiff.

H. H. Trimble, *J. W. Blythe* and *Stiles & Lathrop*, for defendant.

LOVE, *District Judge.*— What is meant by the terms "absolute liability" as here used? They mean a liability created by positive law, free from any conditions whatever. That is absolute which is unconditional. Thus the relation of cause and effect between negligence and the injury is a condition, and the plaintiff's own conduct as to negligence contributing to the injury is a condition. Both of these are at common law conditions to be considered in the right of recovery. But according to the plaintiff's doctrine the statute dispenses with *all* conditions by creating an absolute liability. Thus, having proved the defendant's negligence, the plaintiff contends that the statute imposes an absolute liability for the injury, even though the want of the sign had nothing to do whatever in causing the injury; and the same result would follow, assuming the fact to be that the plaintiff's own misconduct was an essentially contributing cause, or even the sole cause, of the injury. Supposing, indeed, that the absence of the sign-board had nothing to do in causing the injury, it must have been entirely fortuitous or the result of the plaintiff's own negligence.

It is a fundamental rule in the interpretation of statutes that the construction must be put upon the whole and not a part of the words of the act or clause. An interpretation which gives no force and effect whatever to some important and significant words in a clause or section must be rejected in the absence of some conclusive reason for disregarding them as mere surplusage. Now it seems to us that if the plaintiff's construction of section 1288 be correct, the court must entirely reject and disregard the words "sustained by reason of such neglect and refusal," in the clause which provides that "any railway company neglecting or refusing to comply with the provisions of this section shall be liable for all damages sustained by reason of such neglect and refusal." According to the plaintiff's construction the company is liable for *all* damages sustained by the plaintiff, and not merely such damages as are sustained *by reason of* the "neglect or

refusal;" in other words, the defendant is liable, according to this theory, for the damages sustained, whether the same result from the defendant's negligence or not. For the plaintiff contends that the statute imposes an "absolute liability," not a liability depending upon any conditions whatever. It is unimportant, in this view, whether the condition of cause and effect between the negligence and the injury exists or not; in other words, it is not a necessary condition that the damages should be sustained *by reason* of the defendant's neglect or refusal. Even though there should be no connection or relation whatever between the want of a proper sign and the accident; nay, more, though the accident should be the direct and sole result of the plaintiff's own negligence, the defendant must pay the damages, since the statute creates an "absolute liability." This construction, therefore, simply eliminates from the statute the words "all damages sustained *by reason* of such neglect and refusal."

I do not forget that the section further provides that "in order for the injured party to recover it shall only be necessary for him to prove such neglect and refusal." But these words must be construed in connection with those already quoted, and so as to harmonize with them. It is not necessary to put upon these words a construction which would render the words first quoted nugatory. The words last quoted by no means necessarily imply that the defendant's liability shall be absolute and unconditional, thereby making the words first quoted mere surplusage, and cutting off, as counsel contend, all inquiry into the plaintiff's misconduct or negligence.

The words which provide that in order for the injured party to recover it shall "only be necessary for him to *prove* the defendant's neglect or refusal" to erect the sign, relate *ex vi termini* rather to the measure of the plaintiff's proof than to the nature and extent of the defendant's liability. Nothing is said in this section about the defendant's liability being absolute. If it was the purpose of the legislature to

make so radical a change in the law, why was it not expressly declared that the defendant's liability should be absolute and the defense of contributory negligence abolished? Why was so important an innovation left to be inferred from a provision as to what it should be necessary for the plaintiff to prove in order to establish his case? The supreme court of Iowa had, before the passage of the statute in question, established the rule that the plaintiff must, in case of personal injury, in order to recover, prove not only the negligence of the defendant, but his own freedom from contributory negligence. This rule has always been considered unjust and illogical by many members of the bar, and I see no reason to doubt that it was the purpose of this legislation, in the provision under discussion, simply to relieve the plaintiff of this unjust double burden. The legislature simply intended to say to the party injured: "It shall only be necessary for you, in order to recover, to prove the negligence of the defendant in failing to comply with the statute; it shall not be necessary for you to go further and prove that you yourself were not in fault."

This construction not only harmonizes the two provisions of the section quoted above, but it is in strict accordance with our common legal parlance. It is not unusual in legal language to say that it is only necessary for the plaintiff, in order to make out his case, to prove so and so, without for a moment intending to imply that the defendant's liability shall thereby be made absolute, and that he shall be precluded from setting up any proper and usual defense. Again, a construction ought, if possible, to be avoided which leads to injustice or absurdity, and to a plain infraction of established principles, since it is unreasonable to suppose that the legislature intended such results. Let us subject the plaintiff's construction to this test. The liability to the injured party cannot be at the same time absolute and conditional. It must be one or the other. If, therefore, the plaintiff's construction is correct, the railway company must be unconditionally liable for the injury suffered by reason of

the mere fact of failing to erect the sign. Now, the absence of the sign may or may not cause the injury or even contribute to it. The plaintiff's doctrine is that the statute creates an absolute liability, and therefore it makes no difference whatever whether any relation of cause and effect exists between the negligence and the injury or not. This would seem to be illogical, absurd and utterly repugnant to established principles of law. Thus a sign, if it existed, could give no warning to a blind man, and yet, according to the plaintiff's view, if a blind man should venture upon the crossing and receive injury, though he should himself be entirely in fault, the company would be liable. Again, if a party in pitch darkness should, without stopping to listen for a coming train or to look out for its lights, rush upon the crossing and suffer injury, the company would be liable by reason of the absence of the sign, although if the sign were present it could not be seen. So, if a man in full view of a coming train and seeing his danger should be, against his own will, carried by an ungovernable horse upon the crossing, the company would be liable for the injury to both man and animal because of the absence of the sign. Again, suppose a party should see a train approaching the crossing, he would then have all the warning that a sign could give; yet if he should rashly and of his own negligence venture upon the crossing, taking the chances of escape, the company would be liable for his injuries because of its failure to have up the sign. Thus, if the plaintiff's doctrine of "absolute liability" be sound, might a party recover damages resulting entirely and absolutely from his own fault and negligence. This would be unjust and absurd, as well as clearly repugnant to the provision of the statute that the damages recovered shall be "sustained *by reason* of the neglect or refusal" of the company to erect the sign.

It is said that this absolute liability is founded upon considerations of public policy, and that the legislature so intended it; that the provision was intended to be punitive,—

a sort of fine imposed upon the company to compel them to comply with the requirement of the statute. But we have seen that to give the statute this construction it would be necessary to reject or disregard certain express words of the act, and no argument from convenience or policy can justify the court in refusing to give any effect whatever to express words in a statute. Besides, it is difficult to see what sound policy there would be in a law that, while inflicting unjust penalty upon one party, would encourage negligence in another, by assuring him of damages even resulting from his own carelessness. Sound policy requires that both parties in this class of cases should be put to the exercise of diligence by being made to know that damages may result to them from their failure to exercise reasonable care. If the plaintiff's doctrine be sound, I can see no good reason why a party might not recover for injuries resulting from his own *wilful* misconduct in passing a crossing in the face of danger. The plaintiff's counsel admit that there could be no recovery in such case because of the principle that a party can take no advantage from his own wrong. But is not a party's negligence his own wrong as well as his wilful misconduct? The difference between negligence and wilfulness in a civil action for damages is in the degree only, and not in the essence of the wrong-doing. If, moreover, the statute imposes an absolute liability, and inflicts a sort of fine upon the railway company as a penalty for its non-compliance with the law, and this upon grounds of public policy, what difference can it make in the question of contributory negligence whether the plaintiff's injury is the result of his mere negligence or his wilful misconduct?

Undoubtedly the statute makes the failure on the part of the company to erect the sign conclusive evidence of *negligence.* It is negligence *per se*, and no evidence can be received to remove from the company the imputation of negligence. To this extent the statute changes the common law; but does it follow, in the absence of express words, that

the legislature intended to still further change the common law by dispensing with the necessity of all diligence and care on the part of the injured? Was it intended that a plaintiff might wilfully and intentionally, or with gross and wanton negligence, precipitate himself in the face of danger, seeing his peril, upon the crossing, and still recover damages for injuries thus received? In other words, was it the intention of the legislature to repeal by mere implication the long-established doctrine of contributory negligence with reference to cases arising under this statute, and give the plaintiff damages caused by his own misconduct? And could it have been the purpose of this legislation to give the plaintiff damages, although it should clearly appear that his injuries resulted in nowise from the defendant's negligence in failing to erect the sign, but from some other and wholly different cause? And if the latter question be answered in the affirmative, how are we to reconcile such an answer with the express provision of the statute that the defendant "shall be liable for all damages sustained *by reason of such neglect and refusal.*"

It seems to me that if it had been the purpose of the legislature to make such radical changes in the law involving, in many cases, results at once unjust, illogical and absurd, its purpose would have been made known in express terms, and not left to doubtful inference. The statute makes the mere non-erection of the sign negligence, and prescribes that no other proof shall be required to show negligence. Doubtless it is a presumption under this statute that if the sign were up the plaintiff would take notice of it, and being thus warned would avoid injury. But I see nothing in this to preclude the defendant from showing affirmatively that the plaintiff was guilty of contributory negligence, without which the injury would not have occurred. Suppose, for example, that the defendant could show that the plaintiff saw the train nearing the crossing, and, nevertheless, rashly attempted to cross in the face of impending danger, what good reason can there be why he should not be permitted to do so? What

reason would there be in such case in saying that if the sign had been up he might have been warned by it of the coming train and avoided the danger, seeing that he had before him a more impressive warning of the impending danger than any sign-board could have given.

The precise question before the court has not been decided by the supreme court of Iowa. Every case cited from the Iowa reports might be distinguished from the present by essential circumstances. We have, however, no present purpose to review them, since to give them a critical analysis would extend this opinion beyond all reasonable limits. It is sufficient to say that, rightly understood, the Iowa decisions give such decided countenance to the conclusion at which we have arrived as to leave no doubt that the question will, when directly presented to the supreme court of Iowa, be decided as we have here determined it. *Small* v. *R. Co.* 50 Iowa, 338; *Lang* v. *H. C. R. Co.* 49 Iowa, 469; *Dodge* v. *Burlington & C. R. R. Co.* 34 Iowa, 276; *Spence* v. *Chicago & N. W. R. Co.* 25 Iowa, 139–142; *Stewart* v. *Burlington & M. R. Co.* 32 Iowa, 561, 562; *Payne* v. *Chicago, R. I. & P. R. Co.* 44 Iowa, 236.

The motion for a new trial is overruled.

WOLFF and others *v.* ARCHIBALD.

(District of Minnesota. December, 1882.)

1. REMOVAL OF CAUSE — PETITION.— The allegations of the petition for removal are jurisdictional, and they must be positive and certain; and the allegation that the defendant is an alien, "as plaintiff is informed and verily believes," is insufficient.
2. SAME — CITIZENSHIP.— Children of citizens of the United States who are born in foreign countries are citizens of the United States.
3. SAME — JURISDICTION — REMANDING CAUSE.— In all cases where there is doubt as to the jurisdiction, in a cause removed, the safer practice is to remand the cause to the state court.

Motion to remand.

McCRARY, *Circuit Judge (orally).*—We have considered the motion to remand. This cause was removed here by the plaintiff on the ground that the defendant is an alien. The allegation of the petition for removal is that the defendant is an alien, as plaintiff is informed and verily believes. This, we think, is insufficient; the allegations of the petition for removal are jurisdictional, and they must be positive and certain, because the court cannot well proceed to take jurisdiction of a case and try the same as long as there is any doubt upon the question of jurisdiction, and it has, we think, been held that a petition for removal in this form is not good. Besides, it appears by the affidavits filed here that, to say the least, it is a question of grave doubt whether the defendant is an alien or not. His father was a native-born citizen of the United States, born in the state of Vermont. He removed to Canada and spent some of his time in Canada, and the remainder in the United States, and it seems he was sometimes on one side of the line and sometimes on the other. This defendant was born in Canada, and came with his father to this country before he reached his majority. The law is that children of citizens of the United States who are born in foreign countries are citizens of the United States. We think it is probable that this defendant is a citizen of the United States. That is so unless the father became a citizen of Great Britain. Of that there is no proof, and it is, to say the least, doubtful. In all cases where there is doubt in a case of removal as to the jurisdiction of this court, it is safer to remand, because there is no doubt about the jurisdiction of the state court.

The motion to remand is sustained.

Brown & Cheu, for plaintiff.

A. E. Bowe and *Geo. N. Baxter*, for defendant.

SMITH and others *v.* COLORADO FIRE INS. Co. and others.

(District of Colorado. October, 1882.)

1. PLEADING — JOINT ACTION AGAINST CORPORATION AND STOCKHOLDERS. — Under section 201 of the chapter relating to corporations in the state of Colorado, a joint action may be maintained against a corporation and the owners of unpaid capital stock thereof, and a count in a complaint based upon this section is not demurrable for misjoinder of parties.
2. SAME — MAKING REPORT. — A joint action cannot be maintained against the officer of a corporation and the corporation itself for failure to comply with section 206 of the chapter relating to corporations, requiring a report to be made stating the amount of its capital, existing debts, etc.
3. SAME — FAILURE TO ORGANIZE LEGALLY. — When persons get together and assume to be a corporation, without complying with the terms of the statute in regard to organization of corporations, they may be severally and jointly liable as individuals for the debts contracted in the corporate name, but they cannot be made *joint defendants with such corporation* in an action.

Ruling on demurrer.

HALLETT, *District Judge.* — James P. Smith and two people called Sargent sue the Colorado Fire Insurance Company, S. Eldridge Smith and William A. Ellis and George C. Glass, upon a policy of insurance issued by the Colorado Company. After describing the policy and the destruction of the premises by fire, and so on, plaintiffs allege in the first count that the defendants Smith, Ellis and Glass were the owners of equal parts of the capital stock of the insurance company, which is wholly unpaid by them, and they seek apparently in that count to recover the amount of the policy from the defendant company, and from these natural persons, the owners of the stock, jointly.

Section 201 of the chapter relating to corporations declares that "each stockholder shall be liable for the debts of the corporation to the extent that may be unpaid upon the stock held by him, to be collected in the manner herein pro-

vided. Whenever any action is brought to recover any indebtedness against the corporation it shall be competent to proceed against any one or more of the stockholders at the same time to the extent of the balance unpaid . . . upon the stock owned by them respectively, whether called in or not, as in cases of garnishment."

I do not understand that the defendants made any objection to that count; it appears to be based upon the section of the statute, and to be within its provisions.

In the second count plaintiffs set up the same policy of insurance, and the destruction of the premises by fire, and aver that at the time of the execution and delivery of the policy the corporation had not nor has since made a report stating the amount of its capital, . . . existing debts, etc., . . . as required by section 206 of the chapter relating to corporations. That section requires a report to be made as described in this count of the declaration, and declares that if they shall fail to do so, and the capital stock has not been fully paid in, the directors or trustees of the company shall be jointly and severally liable for all the debts of the company that shall be contracted during the year preceding it, . . . and until such report shall be made. In this count it is sought to charge these natural persons, defendants, with the corporation, as trustees of the corporation. The statute does not, so far as I can discover, give any authority for suing the corporation with the trustees in any cause of action arising under that section, and without some provision of the statute the action cannot be maintained. The liability upon this section arises for a failure on the part of the officers to perform the duty enjoined upon them by the statute. It cannot be said that the corporation itself is guilty of the same failure with the officers on whom the duty is enjoined, and it is impossible to say that the corporation is to stand with them upon such liability in the absence of any provision of the statute authorizing it.

In the third count the plaintiffs declare on the policy of

insurance as in the other counts, and allege that although the stock of the corporation had been fixed by the certificate which they had made and filed, that it had not been divided and subscribed for, or distributed to any person or persons whomsoever. That count proceeds upon the theory of wrong-doing on the part of these incorporators in commencing business before they had fully organized their company,— before there was any capital stock paid in which could be liable for the debts of the company. I do not doubt that there is liability on the part of the persons who do the things that are charged in this count; but the question here is whether they may be liable with the corporation itself, because this is an action in which the corporation and the persons who organized it are sued jointly. I think it may be said, when persons get together and assume to be a corporation without complying with the terms of the statute, without having a subscription of stock, as the law requires, in forming the organization, that they may be jointly and severally liable as individuals for the debts contracted in the corporate name, but is not sufficient to maintain this. The action here, as I stated before, is against the corporation itself, and these persons are, as I think, proceeding upon some theory of deceit,— an action on the case, as we used to call it before the legislature abolished all names. I do not think that these defendants can be made jointly liable with the corporation in that way.

The result of all this is, the demurrer must be overruled as to the first count of the complaint, and sustained against the other two counts on the ground that there is a misjoinder of defendants.

Paine *v.* Northern Pac. R. Co.

(District of Minnesota. December, 1882.)

1. Trespass for Cutting Timber — Insufficient Defense. — In a suit by the owner of land for damages for timber cut thereon by the licensee of the vendor, and for the vendor's use, the unrevoked parol license given by the vendor prior to the purchase by complainant is no defense.

Motion for new trial.

Nelson, *District Judge (orally).*— A bill of exceptions was settled and signed for the purpose of allowing a writ of error to the supreme court of the United States. A motion is made by the defendant, the Northern Pacific Railroad Company, for a new trial. Suit was brought by Paine against the Northern Pacific Railroad Company to recover the value of a large amount of timber that was cut upon land owned by plaintiff and sold to him by the Northern Pacific Railroad Company.

The principal defense set up by the Northern Pacific Railroad Company is that, before they sold to Paine, a parol license was given to the Knife Falls Water-power Company to cut upon this specific property, the latter agreeing to cut timber to a certain amount, and deliver to the former at a certain price. The Knife Falls Water-power Company went upon this land and cut the timber. Subsequent to this parol license the land was sold unconditionally to Paine. There is no question but that the timber was cut upon Paine's land after he purchased the property unconditionally. The defense is that this parol license previously given to the Knife Falls Water-power Company was never revoked, and, that being so, it was a defense in this suit of Paine against the railroad company to recover the value of the timber.

I held on the trial that such parol license was no defense to this action.

A writ of error will be allowed, and the case may go to the supreme court upon the bill of exceptions as settled and signed.

Ensign & Cash and *Wilson & Lawrence*, for plaintiff.

W. P. Clough, for defendant.

LATHAM and another *v.* BARNEY and others.

(District of Minnesota. December, 1882.)

1. RELEASE TO ADMINISTRATOR, RATIFYING SALE OF LANDS — FAILURE TO RESCIND, CONTRACT VOID — LACHES, ETC. — Decedent, in his lifetime, was possessed of a certain interest in lands which he held with others. His acting administrator, who owns a part interest in the same lands, obtains the assent of two of decedent's heirs to the sale of decedent's interest in the said land, and forthwith conveys the same to himself and his associates. Thereafter all decedent's heirs, including the complainants, sign a release discharging him from all liability "on account of the assets and property of the deceased in his possession or under his control." In the suit brought by two of these heirs against the acting administrator and his associates, purchasers of the land aforesaid, asking for an accounting of proceeds of sales made by them, and for a conveyance to complainants of the undivided interest in the lands still unsold, *held*, that the release from the heirs of decedent to the administrator, considered in the light of a sale of their interest in the lands by such acting administrator to himself and associates, or as an agreement ratifying such a sale previously made by him, was wholly invalid, and that this being so, and it not appearing that the complainants accepted any benefit from the sale after the facts were known, they are not estopped to assert the invalidity of the sale by reason of laches, failure to rescind, and the like.
2. PROTECTION TO BONA FIDE PURCHASER. — The protection extended to a *bona fide* purchaser belongs only to the purchaser of the legal title without notice of an outstanding equity.

In equity.

On the thirty-first day of October, 1867, a written contract was entered into between Danford N. Barney, Jesse Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney,

Charles F. Latham, Ashbel H. Barney, Samuel M. Hoyt, and Alfred M. Hoyt, parties of the first part, and the Winona & St. Peter Railroad Company, party of the second part. By this agreement it was recited that the parties of the first part had loaned and advanced to the party of the second part large sums of money, and had made, constructed and equipped for it one hundred and five miles of its railroad in the state of Minnesota, whereby the said party of the second part had become indebted to the parties of the first part in a large sum of money. The contract also provides for certain payments upon said indebtedness, and for a conveyance of a portion of the land grant owned by the railroad company in settlement of the residue. This latter portion of the contract is as follows:

"Now, for the residue of the said indebtedness of the said party of the second part to the said parties of the first part, the said party of the second part hath agreed to sell and convey to the said parties of the first part as many acres of land heretofore granted by congress to the state of Minnesota as the said party of the second part shall receive from the said state by reason of the construction of the portion of the Winona & St. Peter Railroad heretofore constructed, to wit, one hundred and five miles thereof, extending westwardly from Winona, excepting and reserving, nevertheless, any and all parts and parcels of such lands (if any such there be) which may be necessary for the track of said railroad, or the right of way, or any depot or depot grounds thereof, or any other purpose incidental to the operation of the said railroad constructed, or to be constructed, or any part thereof; which said lands hereinbefore agreed to be sold shall be conveyed to the said parties of the first part, or as they shall in writing direct, whenever and as soon as the said party of the second part shall obtain a title thereto under such acts of congress. The lands to be conveyed as aforesaid shall be selected as follows:

"Beginning at Winona aforesaid, and from thence proceeding on each side of the said railroad on a course running

parallel therewith, embracing each of the six, ten, fifteen and twenty mile limits of the congressional land grants, and in proceeding taking all lands within each and all of said limits which shall be received by the said company under said acts of congress, or either of them; it being understood that on each side of said railroad a uniform line of advance westwardly, embracing all the lands in said limits, shall be maintained, as nearly as may be, until as many acres shall have been selected and taken as the said company shall have received for the construction of the portion of the said railroad now completed, which is estimated to be one hundred and five miles thereof, extending northerly and westerly from Winona aforesaid; it being understood that the said parties of the first part shall receive as many acres as shall be received by the party of the second part for the construction of the said one hundred and five miles, or so much thereof as is now constructed, notwithstanding that under the acts of congress the said lands are certified only upon the completion of sections of not less than ten miles of railroad, but reserving, excepting and deducting from the said number of acres all lands necessary for the track of said railroad, or the right of way, or depots or depot grounds, or other purposes incidental to the operation of said railroad.

"And the said party of the second part agrees to acquire the title of said lands as fast as it may be permitted to do under said acts of congress, and to release and convey to the said parties of the first part, or to such person or persons in such manner and from time to time as may be devised by said parties of the first part, or their counsel, on the request of the said parties of the first part, or a majority of them, and will do any and every other act and thing necessary and proper to secure the said parties of the first part said lands, and every part and parcel thereof, and the proceeds thereof, if it shall be hereafter determined that the same shall be sold by the said party of the second part for the benefit of the said parties of the first part; and until the

final arrangements shall be made in reference thereto, the title shall be held by the said party of the second part; and as some time is necessary to enable said parties of the first part to confer and agree upon the details in relation to the holding of the title and the mode of disposing of said lands, this clause is inserted to express the agreement of parties in relation thereto."

There was for a time some uncertainty as to the quantity of land to which the parties of the first part were entitled under this agreement, but all such uncertainty was removed by the decree of this court in the case of *Ashbel H. Barney et al.* v. *The Winona & St. Peter R. Co.*, which is in evidence, and which shows the number of acres to be five hundred and fourteen thousand, two hundred and sixty-six and thirty-five and one-half hundredths.

After the execution of said contract, and before any conveyance under it had been executed by the railroad company, the above-named Charles F. Latham died seized of an undivided one thirty-seventh interest in said contract and in the aforesaid lands. The said Charles F. Latham died August 25, 1870, intestate, leaving no father, mother, children or wife. His next of kin and heirs were nine brothers and sisters, and the children of a deceased sister; but as one of the sisters had received her share of his estate in advance, it is conceded that the property of the estate vested in eight brothers and sisters, and the children of the one sister deceased; the said eight brothers and sisters, and the children aforesaid, being entitled respectively to an undivided one-ninth part thereof. The complainants are two of the brothers of said Charles F. Latham, deceased, and were each entitled at his death to one-ninth interest in his estate. No legal proceedings were ever instituted for the settlement of the estate of said Charles F. Latham, and no administrator was ever appointed; but in accordance with his wish, expressed shortly before his death, and with the consent of the heirs, for the purpose of saving the expense of administration, the

defendant Ashbel H. Barney took possession of the assets of the estate, and undertook to distribute them. The estate consisted of a considerable amount of property, mostly personal, in addition to the interest in the land grant acquired under the aforesaid contract, in which latter the defendant Barney held an interest of his own as one of the parties to said contract. Some time after the death of said Latham, two of his sisters and their husbands verbally assented to a sale by defendant Barney of the interest of the estate in the aforesaid lands for the sum of $10,000, he at the time advising them that it was worth no more. It does not appear that any of the other heirs were consulted.

Prior to the ninth day of September, 1871, the defendant Barney entered into an agreement to sell the interest of the estate of said Charles F. Latham in the aforesaid lands for $10,000 to the persons who held the remaining interest, viz., the eight persons who, with said Latham, had, by the contracts aforesaid, purchased the same from the railroad company, the said Barney being one of them. On or about the day last named the defendant Barney caused to be prepared a statement of account between himself and the said estate, and a release to be signed by each of the heirs. A sufficient number of copies of this statement were prepared to provide one copy for each heir and one for said Barney, and they were all sent by express together to each heir to be signed, and, after signing, one executed copy was sent to each. Among the copies of this statement and release was one which differed from the others in a particular to be hereafter stated. All but that one were in the following form:

"Whereas, Charles F. Latham, late of Irvington, county of West Chester and state of New York, died intestate, leaving a considerable estate, consisting of personal property, to be distributed among his next of kin, he, said Latham, having survived his wife and parents, and leaving no children or representative of a child.

"And whereas, the next of kin of said Latham, entitled to participate in the distribution of said estate, for the purpose of saving the delay and expense incidental to legal proceedings to effect such distribution, have agreed among themselves as to the division of said estate, and the amount going to and receivable by each of the next of kin, whether in money, bonds, stock or other property.

"And whereas, the persons entitled to participate in such distribution, and who have agreed upon the same, are the following, and their respective places of residence: William H. Latham, a brother of deceased, Indianapolis, Indiana; Henry M. Latham, a brother, Thetford, Vermont; James K. S. Latham, a brother, San Francisco, California; Edward P. Latham, a brother, Waseca, Minnesota; Lucy H. Kelly, wife of Thomas M. Kelly, sister of deceased, Cleveland, Ohio; Mary Baker, wife of John G. Baker, a sister, Orange, New Jersey; Julia A. Murphy, wife of Gardner B. Murphy, a sister, Cleveland, Ohio; Sarah A. Stockwell, wife of Nathaniel H. Stockwell, a sister, Orange, New Jersey; Azuba F. Barney, wife of Danford N. Barney, a sister, Irvington, New York; the three children of Arthur Latham, a deceased brother, to wit, Arthur and Jeanette, of Thetford, Vermont, and Julia A., wife of Francis W. Corey, of Chicago, Illinois, and all of whom are of full age except Arthur, who is herein represented by his mother, Lura A. Latham, who is guardian of his personal estate.

"And whereas, each of the above-named parties — that is to say, the brothers and sisters of the said Charles F. Latham — are entitled to one-tenth of said estate, and the children of Arthur are each entitled to one-third of a tenth thereof; except, whereas, the said Charles F. Latham, in his life-time, advanced to the said Sarah A. Stockwell all that part or portion of his estate to which she would become entitled on his death, and such advancement was accepted and received by her upon the understanding that she would make

no claim whatever upon his estate on his death, but would release to the other parties entitled thereto all interest in said estate, to be divided among the others next of kin to said Latham.

"And whereas, it is now the intent to give full force and effect to such understanding: Now, therefore, said Sarah A. Stockwell, in consideration of such advancement, doth hereby release all claim on the estate of said Charles F. Latham, and agrees to distribution of the same among the next of kin, exclusive of herself; that is, to each brother and sister a ninth part thereof, and to each of the children of Arthur Latham one-third of a ninth thereof.

"Now, therefore, in consideration of the premises, and also in consideration of the distribution made to each of us of that part or portion of the estate of the said Charles F. Latham to which we and each of us are entitled, as above set forth and declared, the receipt whereof we and each of us do hereby acknowledge, we and each of us have released, remised, and forever discharged, and do hereby, each for himself, his heirs, his executors, administrators and assigns, remise, release and forever discharge the others and each of them, their heirs, executors and administrators, from all claims and demands for the amount so received by them and each of them, in his or her distributive share of the estate of the said Charles F. Latham, and from all debts, demands and actions and causes of action growing out of, or which may result from, the aforesaid distribution.

"And whereas, Ashbel H. Barney, of the city of New York, at the time or subsequent to the death of the said Charles F. Latham, had in his possession or under his control certain of the assets and property of the said Charles F. Latham, which he has surrendered and delivered to the next of kin to the said Latham, and which property and assets entered into the aforesaid distribution and passed to the next of kin:

"Now, this agreement further witnesseth that the said par-

ties hereto, in consideration of the premises and of the surrender and delivery to the said next of kin of the aforesaid property and assets, have, and each of them hath, released, remised and discharged, and they and each of them do, for himself or for herself, their heirs, executors and administrators, remise, release and forever discharge the said Ashbel H. Barney, his heirs, executors and administrators, of and from all claims, demands, actions and causes of action on account of the said assets and property of the said Charles F. Latham so in his possession or under his control.

"In witness whereof the said parties have hereunto set their hands and seals this —— day of ——, in the year one thousand and eight hundred and seventy-one."

[Signed by all the heirs, including complainants.]

"Sealed and delivered in presence of

——————."

Schedule showing the estate of which the late Charles F. Latham died possessed, and the distribution among the next of kin in the foregoing agreement mentioned:

ESTATE.

	Cash bal. at W. F. & Co.'s	$19,835 70
Dec. 8.	Div. on 300 shares Adams Ex.	600 00
Jan. 5.	" 103 " Pawtucket Horse R. R.	515 00
" 12.	22 W. & St. P. coupons	750 75
Feb. 6.	9 Phil. & Erie	315 00
M'rch 8.	Div. on 300 shares Adams Ex.	600 00
May 6.	Division of moneys from W. & St. P. lands	150 36
May 6.	Semi-annual payment on contract with Chic. & N. W. R. Co.	1,691 90
May 19.	Div. on Oil Creek stock	2,312 50
June 17.	Div. on 300 shares Adams Ex. stock	600 00
July 27.	Int. on W. & St. P. lands	280 08
July 27.	22 coupons W. & St. P., 1st mge., less tax	750 75
July 27.	14 coupons W. & St. P., 2d mge., less tax	477 75
July 27.	8 coupons La Crosse, T. & P., less tax	146 25
July 27.	5 coupons Des Moines	197 50
July 29.	9 coupons Phil. & Erie, free of tax	315 00
July 29.	10 coupons O., C. & A. R. R., less tax	336 70

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July 29.	200 shares U. S. Ex. stock at 54	$10,800 00	
July 29.	100 shares U. S. Ex. stock at 53¾	5,375 00	
		$16,175 00	
	Less comm. $37.50, stamps $1.62	39 12	
			$16,135 88
July 31.	300 shares Adams Ex. stock at 81⅛	$24,487 50	
	Less comm. $37.50, stamps $2.46	39 96	
			24,447 54
Aug. 1.	9 Phil. & Erie bonds at 88, less comm.		7,900 00
Aug. 11.	Div. of moneys W. & St. P. land sales		318 48
Sept. 7.	370½ shares O., C. & A. stock at 48¼, B. 30	$17,852 50	
	Int. 30 days	89 26	
		$17,941 76	
	Less comm. and tax	47 60	
			17,894 16
Sept. 7.	10,000 O., C. & A. bonds at 85½	$8,550 00	
	Less comm. $25, and stamps, 86	25 86	
			8,524 14
Sept. 9.	5 Des Moines bonds		5,000 00
	Wood mortgage		1,500 00
	C. & N. W. debt		6,772 04
	Int. on W. & St. P. lands, estimated		10,000 00
	22 W. & St. P. bonds, 1st mge., estimated at 100.		22,000 00
	14 W. & St. P. lands, 2d mge., at 94		13,160 00
	3 La Crosse, T. & P. bonds, estimated at 100		3,000 00
	7 West Side Elevated, 20		700 00
	10 shares W., F. & Co., 6, at 21		270 00
	250 shares U. S. Ex. Co., 51		12,750 00
	103 shares Pawtucket Horse R. Co., 75		7,725 00
			$187,962 48

BEQUESTS.

Home Missionary Society	$2,500 00	
Foreign Missionary Society	2,500 00	
Thetford Mil. Academy	5,000 00	
Jeanette Latham awarded	2,500 00	
A. W. C. Latham, Thetford W. R. Junction	2,500 00	
19 shares W., F. & Co., taken from Miss J. Latham at 67, $1,273; less am't rec'd for same, $316	957 00	
Monument and legal expenses	4,000 00	
		19,957 00
		$168,005 48

NOTE.—Besides the property herein specified, there is certain real estate in California, to wit, a fifty vara lot, corner of California and

Octavia streets, and a two-thirds interest in twenty and six one-hundredths acres in Alameda county. Said property Charles F. Latham desired should be given to his brother, J. K. S. Latham, and a deed of which will be forwarded for the heirs to sign.

There were also debts to quite a large amount against Dr. William Latham, Gardner B. Murphy and Payson Latham, which Mr. Charles Latham wished to have canceled and not included in any division of his estate with the legal heirs.

The remaining statement was an exact duplicate of the above, except as to the item referring to the lands, which item was as follows: "Interest in W. &. St. P. land sales, say $10,000." This latter is the one sent to and retained by complainant E. P. Latham.

The complainants, alleging that the foregoing proceedings, and the execution by them under the circumstances of the release above named, did not divest them of their interest in the lands aforesaid, bring this suit for an accounting as to proceeds of sales heretofore made, and for a conveyance to them of the undivided interest in the lands still unsold. The further facts, in so far as it is deemed necessary to state them, will be found in the opinion.

Gordon E. Cole, for complainants.

Thomas Wilson, for defendants.

McCrary, *Circuit Judge*.— We are clearly of the opinion that upon the facts above stated, without more, it cannot be held that the complainants have divested themselves of the interest in the lands in controversy which they acquired by inheritance from their brother, Charles F. Latham. It does not appear that either of the complainants were consulted about the sale of their interest to the defendant Barney and his associates, much less that they ever authorized the sale by such writing as the law requires, and the question, therefore, is whether the instrument signed by them and set forth in the foregoing statement can be held to be a valid release

or conveyance, or effectual to estop complainants on the ground that it is a ratification or affirmance of the sale previously made by the said Barney. There can be no pretense that there was anything in the paper left with the complainant E. P. Latham that can be construed into an assent to or confirmation of such sale, for in that instrument there is no reference to any sale of the interest of the heirs in the lands, but only a charge for the interest of the heirs in the "Winona & St. Peter land sales." There is, of course, a wide difference between the interest of the heirs in the land sales and their interest in the lands themselves. Let us assume, however, that both complainants are bound by all the statements signed by them, and thus view the question from the standpoint of the defendants. It is more than doubtful whether the release and schedule signed by complainants, considered merely with reference to its terms, can be construed as a release of their interest in the real estate in question. They were dealing with the administrator of their brother's estate, and they must be presumed to have known that an administrator could deal only with the personal estate. This is not the less true because the defendant Barney was acting as such administrator without legal authority. He was at least bound by the rules which would apply to a lawful administrator.

With this rule in mind let us look at the instrument signed by complainants and now relied upon as a release of their interest in the lands in controversy. The very first recitation in this instrument is that "Charles F. Latham, late of the county of West Chester and state of New York, died intestate, leaving a considerable estate, *consisting of personal property*, to be distributed among his next of kin." In the subsequent recitals the property to be distributed is referred to both as "said estate" and as "the estate of said Charles F. Latham," and the release proper from the heirs to defendant Barney is, as will be seen by reference to the instrument, simply a release of said Barney from responsibility for the

assets and property in his possession or under his control, and which had been "surrendered and delivered to the next of kin of said Latham." Surely there is nothing in the recital of this instrument that can be construed into a ratification or approval of any previous sale by the defendant Barney of the interest of the heirs of Latham in any real estate, and there is very much which would lead even the most careful reader to conclude that it was a release only as to the assets or personal property which Barney had possessed, controlled and distributed. We should be very reluctant to hold that the insertion of one item in the schedule which accompanies the release, by which defendant Barney charges himself with "Int. in W. & St. P. lands, estimated at $10,000," was of itself sufficient to constitute the transaction a release by the heirs of all their interests in the lands, even if the release had been executed to a stranger with whom they were dealing at arms-length, and upon terms of equality. In this connection it is worthy of remark that another item in the same schedule is couched in the very same terms, and yet confessedly refers to the proceeds of land sales, and not to a sale of land. We refer to item of date July 27th, which reads: "Int. in W. & St. P. lands, $280." If, however, we assume that there was enough on the face of the instrument to advise complainants that they were receiving and giving a receipt and release for the proceeds of the sale by defendant Barney of all their interest in the lands in question, we are still of the opinion that it did not bind complainants so far as the sale of the land is concerned, nor estop them from claiming their interest therein, for the reason that even the most formal conveyance executed by heirs of Charles F. Latham to defendant Barney, while the latter had possession of the estate and was acting as administrator, would, under the circumstances, have been absolutely void.

The case of *Michoud* v. *Girod*, decided by the supreme court of the United States in 1846 (4 How. 503), is a very instructive and satisfactory authority upon this question. It

is there held that a purchase by executors of property of the estate, even though made at open sale, and where they were empowered by the will to sell the estate for the benefit of heirs and legatees, a part of which heirs and legatees they themselves were, carried fraud upon the face of it, and was void. The rule is laid down without qualification that a person cannot legally purchase on his own account, or as an agent for others, that which his duty or trust requires him to sell on account of another. He is not allowed to unite the two opposite characters of buyer and seller, and the sale then under consideration was set aside, after a lapse of over twenty-five years, notwithstanding the admitted fact that "the sale was a public auction, *bona fide*, and for a fair price." "The inquiry," say the court, "is not whether there was or was not fraud in fact. The purchase is void, and will be set aside at the instance of the *cestui que trust* and a resale ordered, on the ground that the temptation to abuse and the danger of imposition are inaccessible to the eye of the court." The court proceeds to discuss the question whether such sales are void, or only voidable, and while admitting that cases may be found asserting that they are voidable only, the court declares with emphasis that there should be no relaxation of the doctrine that an executor cannot become the purchaser of the property which he represents, or any portion of it, even for a fair price, without fraud, and at a public sale; much less, of course, can he purchase from the heirs at private sale, and without disclosing to them any facts concerning the character or value of the property. Numerous other authorities to the same effect might be cited, but a single decision by the supreme court of the United States, directly in point, is sufficient.

It follows that the execution of the release above mentioned, from complainant to defendant Barney, considered in the light of a sale of their interest in the lands by Barney to himself and associates, or as an agreement approving and ratifying such a sale previously made by him, was wholly in-

valid. It cannot be doubted that if the defendant Barney was incapable of acquiring the interest of the complainants by direct purchase, he could not acquire it by transferring the property to himself and others without the knowledge or consent of complainants, and afterwards obtaining from them a release from all liability on account of the lands. If complainants sold their interest to Barney, it was by the execution of the release. They were parties to no previous sale, and, so far as appears from the evidence, knew nothing of any such sale, except as advised by the face of the instrument itself.

Further argument is not needed to show that the complainants are not estopped to claim their interest in the lands, unless it is by something that has transpired since the execution of the release; and this brings us to the consideration of the defenses which have been pressed upon our consideration by the learned counsel for the defendants. They are: (1) That complainants have been guilty of laches, in that they did not, when advised of the fraud, at once rescind the contract, and tender back the consideration received; (2) that the complainants have ratified and confirmed the sale by accepting, after being fully advised, a balance of purchase money from defendant Barney.

As to the defense of laches and failure to rescind and return consideration, it may be said in the first place that the transaction complained of, being, as we have seen, absolutely void, there is nothing to rescind. The complainants have never parted with any interest in the land. The contract under which it is claimed that they have done so, being contrary to sound morality and public policy, is in fact and in law no contract, and it is, to say the least, doubtful whether it is capable of confirmation or ratification, even by affirmative action. The only effect of a failure to rescind is to ratify and make valid that which is otherwise voidable. Equity regards a purchase by a trustee or executor of the property or real estate placed in his hands to manage for

others as immoral, and contrary to public policy; and so the supreme court declares, in the case above cited, that the general rule which prohibits such purchases "stands upon our great *moral* obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity." We should be very reluctant to hold that such a contract is ratified, confirmed and made valid by the failure of the *cestui que trust* to rescind at once upon discovering the facts. It is not necessary to decide the question whether the heirs, in such a case as the present, can, after being fully advised, by an affirmative act confirm such a sale, for no such question is before us. The voluminous correspondence which is in evidence shows that complainants distinctly disaffirmed the sale as soon as they were fully advised, and that the parties entered into no negotiations respecting the repayment to defendant Barney of the sum distributed by him to the heirs as proceeds of the sale of the lands.

Again, we are of the opinion that the doctrine we are considering has no application to a purchase by a trustee from his *cestui que trust*, especially where there is an accounting to be had between them, and the trustee has in his hands funds belonging to the *cestui que trust*. In such a case the latter may, at any time within the statute of limitations, bring a suit to set aside the sale, by offering to submit to an accounting, and to pay any balance which may be found due the trustee. We have seen no case, nor do we think one can be found, in which the rule with respect to rescission and the return of the price has been applied to such a sale as the one now under consideration. That rule applies only to contracts entered into between parties who deal at arms-length. This is well illustrated in the case we have already cited (*Michoud* v. *Girod*), where the defense of laches was relied upon and overruled. In that case the executors of Girod had purchased the property of the estate at public sale in the year 1814, and in 1817 two of the complainants had executed

formal releases to the executors for their share of the proceeds. It was not until about the year 1844 that suit was brought to set aside the sale to the executors, and yet there was no allegation of an offer to rescind the releases, and to return the money received prior to the bringing of the suit. It was held that the rights of the complainant were not affected by the releases, because they had been executed without "full knowledge of all the circumstances connected with the disposal and management of the estate;" but it was not suggested, either by the eminent counsel or by the court, that they were bound to rescind at once upon discovering the fraud.

Where a trustee, in violation of his trust, purchases the estate of his *cestui que trust*, the right of the latter to relief does not depend upon his having formally rescinded the sale. All that is required is that he shall apply for relief within a reasonable time, and this, as we have seen, may sometimes be a long term of years, and relief "will be granted upon the terms of the *cestui que trust's* repaying to the trustees the amount of the purchase money paid by him, together with interest, . . . while the trustee, or the purchaser with notice, will have to account to the *cestui que trust* for the rents and profits of the estate." Hill, Trust. 539. In other words, there is to be an accounting, and, in all such cases, all that is necessary is that the party seeking the relief shall offer to submit to an accounting, and to pay over any balance in his hands. If this were not the rule, it might result that the *cestui que trust* would be required, as a condition precedent to his right to recover, to pay over to the trustee more than his due.

The present case well illustrates this rule. These complainants received two-ninths of $10,000 from defendant Barney, which the latter insists was their share of the proceeds of the sale of their interest in the lands. The said Barney and his associates, having control of the complainants' interests in said lands, went on and made numerous sales. Before the

complainants were fully advised of all the facts and of their rights a large sum had doubtless been realized by defendant Barney from such sales. Clearly, it cannot be maintained that complainants were bound to return the whole amount received. It does not appear how much was due. The duty of Barney to pay over the proceeds of sales was just as imperative as that of complainants to return the consideration. All that either party could demand was a settlement — an accounting — and the payment of any balance due. In view of these considerations, without adverting to others, we are constrained to hold that complainants are not barred by laches nor by their failure to formally rescind and tender back the consideration.

It is contended, in the next place, that complainants are estopped from denying the validity of the sale in question because they received a part of the consideration after a knowledge of the fraud, and thereby confirmed the transaction. The general rule, no doubt, is that the taking of any benefit under a contract, after knowledge of the alleged fraud, is a ratification of the contract. We will not stop to consider whether this doctrine applies to a contract that is absolutely void as against good morals and public policy, for, even conceding that it does, we are clearly of the opinion that it has no application to the facts of this case. It appears that the statement and schedule quoted in the foregoing statement were presented to complainants and the other heirs as a full and final settlement and distribution of all personal estate in the hands of defendant Barney. It appears upon its face to have been intended as a final distribution. There was, however, one item credited to said Barney designated "monument and legal expenses, $4,000." This sum was left in the hands of the said Barney for the purposes named. Some time afterwards it was determined not to erect a monument, but to substitute a tombstone of comparatively small cost. This, of course, left a balance in Mr. Barney's hands and made a further distribution neces-

sary. In the statements sent to complainants, with a remittance of their respective shares of this balance, no mention is made of the land sales or their proceeds. It seems to have been understood that it was a separate and distinct matter.

A long correspondence about the sale of the land, and the disposition to be made of the $10,000 distributed on that account, had preceded the disposition arising from the non-use of the monument fund, and was still pending. The matter of the alleged sale of the interest of the heirs in the land for $10,000 had been long discussed by itself as a separate and distinct matter, and the evidence very clearly shows that complainants did not understand that they were adjusting that matter by accepting the last balance sent them. On the contrary, it appears beyond a doubt that they understood exactly the contrary, for it is shown that when that balance was first sent to them it was accompanied by a formal release of defendant Barney from all claim on account of the proceeds of the sale of the lands, and a confirmation of said sale, which release and confirmation they both refused to sign. They refused to receive the money tendered them on condition that they would sign this document, and gave as a reason their unwillingness to confirm the alleged sale, and subsequently Mr. Barney sent them the money and accepted a simple receipt for it. Here is conclusive evidence that there was no intention to ratify the sale of the land by accepting this balance, and we apprehend that the rule of law relied upon by counsel for defendants rests upon the fact that the receipt of part of the consideration for a contract with full knowledge that it is fraudulent shows a purpose to accept the benefit of the contract, and is therefore an affirmance of it. In the present case, the evidence does not show that complainants actually received a part of the $10,000 after they were advised of all the facts. It only shows that they settled with Barney for the balance left in his hands for "monument fund and legal expenses," and not used for those purposes, and that the settlement was made when a

separate negotiation was in progress with respect to the land matter, and it shows that complainants regarded the two as separate and distinct.

We hold, therefore, that complainants are not estopped to assert the invalidity of the sale in question upon the ground that they ratified and confirmed it by accepting a benefit from it after being advised of all the facts.

It was suggested in the argument that some of the defendants are *bona fide* purchasers of interests in the lands without notice of complainants' rights. This point is not well taken. The legal title is in the railroad company, and the equitable title only in the purchasers under the contract of sale. The protection extended by a court of equity to a *bona fide* purchaser belongs only to the purchaser of the legal title without notice of an outstanding equity. He who purchases no legal title is not protected, even though without actual notice. *Butler* v. *Douglass*, 1 McCrary, 630; Story, Eq. Jur. § 1502; *Vattier* v. *Hinde*, 7 Pet. 252.

We are not advised that any of the defendants claim to have purchased from the railroad company without notice of the contract, or of the rights of the purchasers under it. If any such claim is made it can be considered hereafter.

Our conclusion is that the attempted purchase of the interests of the complainants in the lands in question by the defendant Barney for himself and his associates was and is void, and that the complainants are entitled to a decree so declaring, and to an accounting.

The case will be referred to a master to take further proof and report to the court as follows:

(1) The number of acres of land sold or disposed of out of the lands described in the bill since September 9, 1871, the dates of sales, the prices at which sold, and the sum total realized therefor.

(2) To this sum total the master will add interest on the several sums at seven per cent. per annum from the date

when received, and from the total thus obtained will deduct the sums received by complainants respectively from defendant Barney; also all necessary and reasonable expenditures by the defendants, or any of them, in making such sales, and for the payment of taxes, with like interest on each of said sums.

(3) And he will find and report what sum, if any, is due the complainants as their share of the proceeds of such sales.

(4) Said master will also find and report what number of acres of said land remains unsold, and a description thereof.

NELSON, *District Judge*, concurs.

CHICAGO, M. & ST. P. R'Y CO. *v.* MINNESOTA CENT. R. CO. and another.

(District of Minnesota. 1882.)

1. RIGHTS OF RAILROAD COMPANIES UNDER CITY ORDINANCE.— A railroad company having submitted to construct its road through a city under an ordinance reserving the right to alter and amend, must submit to such alterations, etc., as are reasonable and necessary. But such an ordinance shall not be amended or repealed so as to effect essential and vested rights, or be allowed to act retrospectively to take away rights previously granted.
2. CONDITIONS SUBSEQUENT.— Conditions subsequent are not held in favor by courts of equity, and they will not enforce them unless the contract clearly compels it.
3. CITY ORDINANCE — COVENANT IN — BREACH OF.— The breach of a covenant contained in a city ordinance will not authorize the common council to divest any estate granted by such ordinance.

In equity.

The Minnesota & Pacific Railroad Company was authorized by the legislature of the territory of Minnesota to construct a railroad from the city of Winona, in this state, up the valley of the Mississippi river, to the city of St. Paul. The present complainant has succeeded to all the rights of

said company, and obtained all the power and authority which was granted to the Minnesota & Pacific Railroad Company by its charter for constructing this road. Among the chartered rights of the Minnesota & Pacific Railroad Company was the authority to construct its road and branches "upon, along, across, over, or under any public highway, road or street, if the same shall be necessary." The immediate successor of the Minnesota & Pacific Railroad Company to the right to construct the Winona branch, so called, was the St. Paul & Pacific Railroad Company, and this branch was afterwards designated as the St. Paul & Chicago Railway Company, the immediate successor of the present complainant. This branch was constructed by the St. Paul & Chicago Company, and as the city of Red Wing, on the line of the road, was reached, the company was proceeding to build its road through the southern portion of the city, when, at the instigation of the city authorities, an arrangement was made under which the company agreed to change its route to the northern portion of the city, near the river, and the following ordinance was passed by the common council of the city, with the concurrence of the company:

"ORDINANCE No. 52.

"An ordinance granting the right of way to the St. Paul & Chicago Railway Company through the city of Red Wing.

"*The City Council of the City of Red Wing do ordain:*

"Section 1. The St. Paul & Chicago Railway Company is hereby authorized and empowered to locate and construct its railroad into and through the city of Red Wing, with such number of tracks, switches, turnouts and side tracks as may be necessary for the business of said company over, upon and across such streets as the line of said railroad as now located crosses; and also over, along and upon the steamboat landing or public levee in front of blocks 41, 42 and 43, in Red Wing proper, and to operate and use such tracks,

with locomotives and cars, *except* and *provided* that only the tracks of said railroad now constructed shall be located or constructed at any place within said city east of Bush street.

"Sec. 2. The said franchise and right of way are granted to and accepted by the said St. Paul & Chicago Railway Company upon the express conditions following; that is to say:

"*First.* That as a condition precedent to the right to construct and maintain said tracks, turnouts and switches over and upon said streets and public levee, said company shall grade the said levee between the wharves as now constructed in front of said blocks 41 and 42 in such a manner as not to prevent or obstruct access to and the free use of such levee as a steamboat landing, and for the purposes of the business connected therewith.

"*Second.* The said company shall fill up and keep and maintain the said levee between the main track of said railroad and the northerly line of said blocks 41 and 42 in such a manner so that the said levee shall be as near level with the top of the rails of said track as practicable, and afford suitable drainage towards Potter street.

"*Third.* The said company shall construct and maintain all gutters and water-courses necessary to conduct and carry off the water from said levee in such manner as to prevent all surface water from injuring said levee.

"*Fourth.* The said company shall plank the space between and immediately outside of the rails of said railway in all places on all of its tracks laid across or upon said levee, or in front of said blocks 41, 42 and 43, which planking the said company shall at all times keep in a good and proper state of repair.

"*Fifth.* The said company shall at all places in front of said blocks 41 and 42 lay the rails of said tracks in such manner so that the top of said rails shall be and remain at least eight inches below the level of the door-sill of the storm warehouse now owned by James Lawther and situated upon lot 9 in said block 42.

"*Sixth.* The said company shall so locate and construct its tracks, switches and improvements as to afford convenient and easy crossings and carriage ways over the same at all street and alley crossings within said city, with an easy grade suitable for the safe and ready passage of vehicles of all kinds; all such crossings to be planked inside and outside of tracks to the top of the rail, and which crossings shall at all times be by said company kept in a good and proper state of repair; said crossings at Plum and Bush streets to be so planked to the width of not less than thirty feet, and the one at Broad street to the width of not less than sixty feet; and said company shall within twenty days after notice cause Levee street, between Plum and Broad streets, to be made and put in as good condition, and in all respects as accessible for public use, as the same was before said company commenced the construction of its road between the streets last aforesaid; all to be done under the direction of said city council and to its acceptance.

"*Seventh.* If at any time hereafter said city shall cause to be laid out or opened any streets or alleys crossing any of said tracks, the said company shall, within five days after notice from said city council so to do, make and plank the crossings of such streets and alleys in manner as provided in said sixth condition thereof; and if at any time hereafter said council shall deem it necessary that any crossings should be filled or planked to a width greater than that originally designated, said company shall, within five days after notice so to do, fill and plank such crossings to such increased width as may be designated by said council.

"*Eighth.* The said company shall make in a good and sufficient manner all water-courses, ditches and drains necessary to carry off all water, so that there shall not at any time, within said city, be any stagnant water caused by reason of any work done or to be done by said company.

"*Ninth.* If at any time hereafter said city shall cause Levee street to be graded, the said company shall, within

twenty days after notice so to do, fill up the intervening space which may be upon the land of company in block 52, in Red Wing proper, and the northerly line of said street, level with the grade of said street, as it is or may be established by said city; and in like manner fill the crossings at Bush and Plum streets.

"*Tenth.* The said company shall keep the streets and said levee as free as possible from freights, trains, locomotive engines and cars, and shall not permit any locomotive, car or cars, or train of cars, to stop or remain upon any street crossing for a longer period than five minutes at any one time; and said company shall not obstruct or necessarily interfere with the convenient operation of steamboats or passenger or freight traffic on said public levee; and shall not permit any car or cars to stand or be upon said levee except while the same are being actually loaded at or from some warehouse thereon.

"*Eleventh.* The said company shall not permit any locomotive engine, railroad passenger car or freight car to be driven, propelled or run upon or along the track of said company at a greater rate of speed than four miles per hour at any point within said city between the westerly end of Barn bluff and the westerly side of Jackson street; and at each of said places said company shall erect and maintain a sign-board having thereon the words 'Stop speed; ring the bell;' and while in motion between said points the bell of such locomotive shall be continually sounded to warn persons of approaching danger.

"*Twelfth.* The said company shall, at each and every street crossing within said city, erect and maintain a sign-board having distinctly painted thereon the words 'Railroad crossing.'

"*Thirteenth.* The said company shall not change the grade of its railroad, at any point within said city, without the consent of said city council.

"*Fourteenth.* All acts or work or labor done or to be

done or performed by said company under the provisions hereof shall be done in such manner as directed by and to the satisfaction and acceptance of said city council.

"*Fifteenth.* The service upon the person in charge of the station house of said company, situate within said city, of any notice herein provided, shall be in all respects deemed and held a good and sufficient service upon said company. The officer, servants, agents and employees of said company shall be subject to all police regulations under this ordinance, and under any other law or ordinance of said city.

"*Sixteenth.* The said company expressly assumes the responsibility of all damages to life, limb or property resulting from any failure or neglect to comply with any of the provisions of this ordinance, or any by-law or resolution passed thereunder, or any other by-law, resolution or ordinance now or hereafter in force within said city.

"*Seventeenth.* This ordinance may at any time hereafter be changed, amended or modified by said city, or the proper authorities thereof.

"Passed July 12, 1870."

The present complainant is the owner of several city blocks adjoining the river, and abutting on the south a street designated on the city plat as Levee street, one of the streets specified in the ordinance through which the company was authorized to build its tracks, and since 1870, either by the St. Paul & Chicago Railway Company or the complainant, several tracks have been laid, most of them on the company's land, but crossing all the streets intersecting Levee street at right angles between Hill and Bush streets. There are no tracks running longitudinally on this Levee street, but a spur track has been built from the company's land over a part of the street to reach certain flouring mills and warehouses built on the lots fronting the southerly portion. On November 4, 1882, the complainant commenced to build a track lengthwise of Levee street on that part fronting and abutting its lots near Dakota to Hill street, which track

would connect the yard and depot with turn-table and round-house, and on November 14th had expended, as appears by the bill of complaint, about $1,500, and was continuing its construction. On that day the common council passed the following ordinance:

"An ordinance to amend an ordinance of the city of Red Wing, Minnesota, passed July 12, 1871, entitled 'An ordinance granting the right of way to the St. Paul & Chicago Railway Company through the city of Red Wing.'

"*The City Council of the City of Red Wing do ordain:*

"Section 1. That an ordinance of said city, passed July 12, 1871, entitled 'An ordinance granting the right of way to the St. Paul & Chicago Railway Company through the city of Red Wing,' be and the same is hereby amended by adding thereto the following new section, to be numbered and known as section 3; that is to say:

"Sec. 3. It shall not be lawful for the St. Paul & Chicago Railway Company, or its successors or assigns, nor for the Chicago, Milwaukee & St. Paul Railway Company, to enter upon or grade or lay any ties, rails or railroad track or any switch or turn-out or any other matter or thing in or upon, or in any manner to use or occupy any part of the steamboat landing or public levee in front of any of the blocks numbered respectively 41, 42 and 43, in Red Wing proper, or any part of Levee street within the limits of said city, without first having obtained from the city council of said city a license authorizing such entry and the laying of such additional railroad track; provided, that nothing in this section contained shall be so construed as to prevent the use of said railway companies, or either of them, of any railroad track fully laid and in use by said companies, or either of them, prior to the fourteenth day of November, 1882, and which track has been so laid and operated by authority of said city council."

—And notified the company to desist from the work contemplated. On the same day or evening previous an ordi-

nance was passed granting the right of way over Levee street to the Minnesota Central Railroad Company.

The complainant owned the fee of Levee street to the center abutting its property, and, without first obtaining authority by condemnation or otherwise for the additional burden to be imposed thereon, the Minnesota Central Railroad Company proceeded to construct its track over and along this Levee street, in front of complainant's lots and blocks. A bill is filed by the Chicago, Milwaukee & St. Paul Railway Company against the city of Red Wing and the Minnesota Central Railroad Company, and an injunction is prayed against the city to prevent interference with the construction of the track surveyed along Levee street, and against the Minnesota Central Railroad Company.

H. R. Bigelow, for complainant.

Gordon E. Cole, for Minnesota Central Railroad Company.

W. C. Williston, for city of Red Wing.

NELSON, *District Judge.*— It appeared on the argument, from an affidavit of the president or active manager in construction of the Minnesota Central Railroad, that, without the knowledge and direction of him or any officer having authority, a track was being laid by its employees under the ordinance granted, as set forth in the bill of complaint; but it is also stated that when he was informed of it direction was given to desist, which they did, and that this company has no intention to further proceed, unless, by proper condemnation proceedings, the right so to do is legally obtained. Upon such disclaimer I shall not issue a preliminary injunction at this time against the railroad company, but give leave to the complainant to apply for an injunction at a future time in case an attempt is made to construct its track upon that part of the street over which the complainant has the fee.

In respect to the city: The company having voluntarily submitted to construct its road through the city of Red Wing under the ordinance reserving the right to alter and amend, must submit to such alterations and amendments as are reasonable and necessary. The ordinance did not, however, give authority to amend or repeal so as to affect essential and vested rights. The common council of the city reserved the right to alter and amend this ordinance of 1870 within the scope of the legislative power conferred on the municipality, but no more than reasonable alterations could be passed, such as would be necessary to carry into effect the original purposes of the ordinance and properly preserve the rights of the public. No exclusive right of way over that or any other street was given to the complainant or its predecessor. It could grant authority to another corporation to run its track over the street, and thus confer, so far as it was possible for the city to do, a right to use the street, but in so doing the city could not interfere with the rights acquired by the complainant. Has it done so by the subsequent amendment to the ordinance of 1871, by its action November 14, 1882?

It was stated on the argument, by the counsel for the city, that in this controversy the city really had no interest, and that it was one between the two railroad companies. If such is the understanding of the common council, then it was not the purpose of the city, by the last ordinance, to interfere with any rights of property in and to the street which the complainant had acquired. Certainly this amendment could not act retrospectively and take away rights of property which had been previously granted. At the utmost, the ordinance can only compel the complainant to obtain the consent of the city before more tracks could be laid down by it upon Levee street. It is urged that the ordinance prevented the complainant from completing the work already commenced on November 4, 1882, and it appears such was the view entertained by the city authorities when notice was served on the complainant to stop work. I cannot assent to

such construction of the ordinance. The right of way given was a private grant on the part of the city, and the complainant, having the authority, proceeded to construct its track and exercise the right granted. It was clearly necessary, as disclosed, not only by the bill, but by the affidavits of the citizens of Red Wing, read on the part of the defendants. The number of cars required to furnish transportation, and the large mills and warehouses on Levee street furnishing freight, and the great growth of the city and the surrounding country, required not only greater facilities than the complainant supplied, but had induced the construction of the Minnesota Central Railroad, making the city of Red Wing a terminus. The ordinance of 1871 contemplated such increase of traffic, and authorized the building of all necessary tracks to meet the requirements of trade and the wants of the public, but no exclusive right of way was given. The company, in good faith, for aught that appears, was exercising legally the right given by the city ordinance, and had expended quite an amount of money in construction when stopped. I think the arrangement entered into between the city and the complainant's predecessor, by which its route was changed and the ordinance of 1871 was passed, was more than a mere license which could be revoked at a future time. It has all the elements of a contract, in view of the fact that the charter gave legislative authority to use the public streets in constructing the road from Winona to St. Paul.

It was urged upon the hearing that the complainant had violated a condition (No. 10) upon which the right of way was granted, and the common council could repeal, and thus divest the property rights acquired thereunder. At the most, this provision (No. 10) is a condition subsequent, and courts of equity do not look with favor upon such conditions, and certainly will not enforce them, unless the contract clearly compels it. I am inclined, however, to think the provision No. 10 in this ordinance is in its nature a mere

covenant, and a breach would not authorize the common council to divest the estate.

In view of what has been stated, I think the complainant can complete the track it was building when work stopped, notwithstanding the ordinance of November 14, 1882; but, as the counsel for the city states the controversy is one between the defendant railroad and the complainant, and the city really has no interest at stake, I shall not issue an injunction unless there is future interference with the contemplated work.

In the view taken it is not necessary to consider the effect of a suit commenced in the state court by the city of Red Wing against the Chicago, Milwaukee & St. Paul Railway Company, and removed to this court, where it is now pending.

Motion for injunction denied, with leave to renew.

Forty-Three Cases Cognac Brandy, etc.

(District of Minnesota. December, 1883.)

1. Indian Country.— A particular portion of the public domain upon which an Indian tribe has been suffered long to remain, while other portions have been opened to settlement, or set apart particularly for Indian occupation, does not constitute such tract an Indian reservation.
2. Same.— The fact that a tract of country has sometimes been referred to in treaties and official reports as the Red Lake Reservation, is not sufficient to authorize the court, in a *quasi* criminal case, to declare it to be such.

Error to the district court. On motion for rehearing.

After the announcement of the opinion of the court in this case, counsel for the government asked a further hearing upon the question whether the *locus in quo* is within an Indian reservation, and the court ordered further argument

upon that question, which was had at the December term, 1882.

C. K. Davis, for plaintiff in error.

C. A. Congdon, Assistant United States Attorney, for the United States.

McCRARY, *Circuit Judge.*— An Indian reservation is a part of the public domain set apart by proper authority for the use and occupation of a tribe or tribes of Indians. It may be set apart by an act of congress, by treaty, or by executive order; I do not think an Indian reservation can be established by custom or prescription. The fact that a particular tribe or band of Indians have for a long time occupied a particular tract of country does not constitute such tract an Indian reservation. Originally, all of the public domain was occupied by the Indians, and the reservation policy was adopted with a view of locating them in certain districts, and opening the remainder of the public land for white settlement. It cannot, therefore, be said that a particular portion of the public domain, upon which an Indian tribe has been suffered long to remain, while other portions have been open to settlement, or set apart specifically for Indian occupation, constitutes such tract an Indian reservation. It simply retains the character it had at the beginning, and can only be correctly designated as a tract of public land to which the Indian title has not been extinguished.

Such is the character of the *locus in quo* in this case. It comes clearly within the description of "Indian country" as defined by the act of 1834, to wit, "territory to which the Indian title has not been extinguished." If this definition were still in force, it would exactly designate the place where the seizure was made; but, as we have heretofore held, it was repealed by the enactment of the Revised Statutes. To hold it still to be Indian country would be to give no effect to the repeal. The fact that the tract of country in question

has been sometimes referred to in treaties and official reports as "Red Lake Indian Reservation," is not sufficient to authorize the court, in a *quasi* criminal case, to declare it to be such.

The motion for rehearing is overruled.

UNITED STATES *v.* SNYDER and another.

(District of Minnesota. February, 1883.)

1. CRIMINAL LAW — FRAUDULENT RETURNS OF POSTMASTER. — Any postmaster who shall make a false return to the auditor for the purpose of fraudulently increasing his compensation shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished under the provisions of chapter 259, vol. 20, Stats. at Large (2 Supp. Rev. St. 358).
2. SAME — AIDERS AND ABETTORS — AS PRINCIPALS. — The statute above cited is not limited in its operation to the conviction and punishment of the postmaster guilty of the offense alone, but may be extended to all persons aiding, abetting and assisting in the commission of the crime, who are alike guilty of a misdemeanor under the statute, and may be indicted and convicted thereunder as principals.
3. SAME — PUNISHMENT OF AIDERS AND PROCURERS. — All aiders, procurers or abettors in statutory offenses are punishable as principals, under the statute, although not expressly referred to in the statute, and that a defendant, though incompetent to commit the offense, as principal, by reason of not being of the particular age, particular sex, condition or class, may nevertheless be punished as procurer or abettor.
4. INTENT OR MOTIVE — EVIDENCE OF OTHER SIMILAR ACTS. — Where the question is one of a fraudulent intent, it is allowable, as well in criminal as in civil cases, "to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish the intent or motive in the particular act directly in judgment."
5. SAME — TRANSCRIPT OF AUDITOR OF DEPARTMENT. — It was *held* proper to admit in evidence the transcript of the report described in the indictment, duly certified by one of the auditors of the treasury for the postoffice department.
6. EXCEPTION — ERROR. — Exception having been taken, on previous trial of this case, to the statement by the district attorney, in his ar-

gument before the jury, to the effect that the failure of the defendant to testify in his own behalf should raise presumption against him, *held*, that it appearing on the records of such previous trial that the judge in his charge had corrected the remark, and stated to the jury that such language by the district attorney was wrong, cured whatever error there was in such statement.

The defendants are indicted under chapter 259, vol. 20, Stats. at Large (Supp. to Rev. St., vol. 1, p. 358), which provides that "any postmaster who shall make a false return to the auditor for the purpose of fraudulently increasing his compensation under the provision of this or any other act, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not less than fifty nor more than five hundred dollars, or imprisonment for a term not exceeding one year, or punishment by both such fine and imprisonment, in the discretion of the court." The defendant Snyder was postmaster at Germania, Minnesota. The defendants are jointly charged in the indictment with having wilfully, etc., made a false return to the auditor of the treasury of the United States for the postoffice department for the purpose of fraudulently increasing the compensation of the said Mait. Snyder, as such postmaster, under the provisions of an act of congress mentioned in the indictment. There was a trial in the district court, which resulted in a verdict of guilty against Bertram, who moved for a new trial, and in arrest of judgment on grounds which are stated in the opinion. The case having been certified into this court by the district judge, has been here argued.

C. A. Congdon, Assistant United States Attorney, for the Government.

O'Brien & Wilson, for defendant.

McCrary, *Circuit Judge.*—1. The first and most important question presented by this record is whether defendant Bertram, not being a postmaster, can be indicted and pun-

ished under the above-mentioned act of congress. That act, by its terms, applies only to postmasters, and the question is whether any other person can be found guilty of a misdemeanor under it. The record in this case shows that the defendant Bertram was guilty of aiding, abetting and assisting Snyder in the commission of the crime. He in fact prepared with his own hand the false reports, and, knowing them to be false, advised and induced Snyder to sign them. Upon careful consideration we have reached the conclusion that this was an offense against the statute, notwithstanding the fact that only postmasters are named therein. The offense is a statutory misdemeanor, and it is well settled that all who aid, abet, procure or advise the commission of a misdemeanor are guilty as principals. 1 Russ. Crimes (9th ed.), 60, note 1. And this is the rule whether the misdemeanor is created by statute or by the common law. *U. S.* v. *Mills*, 7 Pet. 138.

When congress creates a statutory misdemeanor we must assume that it is done with the above well-settled rules of law in view, and if so, with the intent that aiders and abettors, as well as the actual doers of the crime, may be punished under it. The rule that all procurers and abettors of statutory offenses are punishable under the statutes, although not expressly referred to in the statute, is supported by authority. Bish. St. Crimes, 36; *Com.* v. *Garnet*, 1 Allyn, 7; *U. S.* v. *Harbison*, 1 Int. Rev. Rec. 118; *U. S.* v. *Bayer*, 4 Dill. 407.

Although the defendant Bertram, not being postmaster, was incapable of being the principal actor in the commission of the crime, he may nevertheless be held to be an aider, procurer and abettor, and therefore, in law, a principal. It has been adjudged repeatedly that the fact that a defendant was incompetent to commit the offense as principal by reason of not being of a particular age, sex, condition or class, he may, nevertheless, be punished as procurer or abettor. *State* v. *Sprague*, 4 R. I. 257; *Boggus* v. *State*, 34 Ga. 275; *Rex* v. *Potts*, Russ. & R. Cr. Cas. 352; Bish. Crim. Law, 627–629;

U. S. v. *Bayer*, *supra*. This doctrine is also supported by reason, for if it were not sound there could be no punishment of the crime of procuring a postmaster to defraud the United States by making false returns, even although the procurer might share in the proceeds of the fraud, and be actuated by the worst of motives.

2. The offense charged was the making of false returns for the quarter ending December 31, 1880. The prosecutor was allowed, against the objection of defendant, to introduce in evidence, not only the false returns for that quarter, but other similar returns for other periods before and after the time covered by the indictment, all being in the handwriting of the defendant Bertram. There was no error in this ruling. Where the question is one of fraudulent intent, it is allowable, as well in criminal as in civil cases, "to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment." *Wood* v. *U. S.* 16 Pet. 342.

3. It is insisted that defendant has been unlawfully convicted upon the uncorroborated testimony of an accomplice. It is true that the principal witness against defendant Bertram was his co-defendant and accomplice, Snyder, but it is not true that Snyder's testimony is uncorroborated. It is strongly supported by the testimony of Harris and Scanlon, who testify to facts tending to prove that the reports in question must have been false; by the letters from Bertram to Snyder, which are in evidence, and which show pretty clearly a knowledge of the crime and a desire to suppress the truth; and by the fact that the reports were all in Bertram's handwriting.

4. Exception is taken to the remarks of the district attorney, in his argument before the jury, to the effect that the failure of Bertram to testify in his own behalf should raise a presumption against him. This was improper, and if the court had failed to correct it on trial it might have been

error. But the record shows that the court at once instructed the jury, and repeated it in the final charge, that such language by the district attorney was wrong, and that no presumption should be taken against the defendant because he did not testify in his own behalf. This cured whatever error there was in the remarks of the district attorney. If this were not so, it would be within the power of counsel, by such remarks, to invalidate the proceedings in any criminal case. *Ruloff* v. *People*, 45 N. Y. 213.

5. The transcript of the quarterly report described in the indictment, duly certified by the sixth auditor of the treasury for the postoffice department, was properly admitted in evidence. Rev. St. § 889.

The motion in arrest of judgment must be overruled.

NELSON, *District Judge*, concurs.

HAFF *v.* MINNEAPOLIS & ST. L. R'Y CO. and others.

(District of Minnesota. December, 1882.)

1. NEGLIGENCE — PERSONAL INJURIES — PROXIMATE CAUSE — DAMAGES. — To obtain a verdict for damages by reason of alleged negligence, it must be proven that the negligence of the defendant was the proximate cause of the injury.
2. SAME — RAILROAD COMPANY — DUTY UNDER LEASE. — A railroad company, having by lease the right to use the depot grounds and tracks of another company, owes the same duty to passengers of that company lawfully on the ground as it does to its own.
3. SAME — DUE DILIGENCE. — The question, what constitutes "due diligence?" in an action to recover damages caused by negligence, is one for the jury, and the *burden of proof* in such case is with the plaintiff to show the negligence.
4. SAME — CONTRIBUTORY NEGLIGENCE — CHOICE BETWEEN HAZARDS. — Where one, in the face of great danger, and obliged to choose between two hazards, makes such choice as a person of ordinary prudence and care placed in the same situation might make, and is thereby injured, the fact that if he had chosen the other hazard he would have escaped injury will not relieve the one by reason of whose negligence he was put in jeopardy.

At law.

A suit is brought against both defendants, seeking to hold them liable for a personal injury sustained by their negligence. The Minneapolis & St. Louis Railway Company owned the depot grounds and track where the injury occurred, and had by lease permitted the Burlington, Cedar Rapids & Northern Railway Company to use them in common. The injury is alleged in the pleading to have been the result of the carelessness of the Burlington, Cedar Rapids & Northern Company while running its engine over the main track used by both companies. It is claimed both companies are liable. Additional facts appear in the charge of the court.

Lovely & Morgan, for plaintiff.

J. D. Springer, for defendants.

NELSON, *District Judge (charging jury).*— The issue in this case has been simplified so that it will not be necessary for me to detain you long. I will suggest (as I stated when the testimony was closed) that there is no cause of action against the Minneapolis & St. Louis Company, and your verdict must be in favor of that defendant. That leaves the action to proceed against the Burlington, Cedar Rapids & Northern Company.

This suit is brought by the plaintiff, a citizen of Michigan, to recover damages for a personal injury resulting from the negligence, as he claims, of the defendant, the Burlington, Cedar Rapids & Northern Company. The injury, resulting in the amputation of a leg, occurred at a railroad crossing in the depot grounds at Albert Lea, in this state, and was inflicted by a locomotive belonging to the Burlington, Cedar Rapids & Northern Company, and operated by its employees.

These depot grounds are owned by the Minneapolis & St. Louis Company, a corporation created by the laws of the state of Minnesota, and authorized to build and operate a railroad through Albert Lea, in the direction of Fort Dodge, Iowa.

The Burlington, Cedar Rapids & Northern, an Iowa corporation operating a road from Burlington, Iowa, to Albert Lea, is authorized by the laws of this state to make running connections with the Minneapolis & St. Louis, and hold a lease of the depot grounds, granting certain rights and privileges thereto. Both roads have running connections, and there is a continuous rail leading from the terminus of one to the other, and both use the same depot grounds and yards. The track where the injury occurred was used in common by both companies. They also ran a through express train from Minneapolis to Chicago, the Minneapolis & St. Louis Company, by its engine, running a train which was made up in Minneapolis to Albert Lea, where this engine is cut off, and the train, taken by an engine belonging to the Burlington, Cedar Rapids & Northern Company, proceeds south on its way.

The injury being inflicted by a locomotive of the defendant company, it is claimed that it is liable for the injury which the plaintiff received.

The gist of this action is negligence, — the failure to perform a duty the defendant owed to the plaintiff which the law imposed. The plaintiff is not entitled to recover damages because he was run over and severely injured by a locomotive owned and operated by the defendant. He must prove to you that the negligence of the defendant was the proximate cause of the injury sustained by him before he is entitled to a verdict.

Before proceeding to instruct you upon the law applicable to this case, I would preface my remarks by saying that it is your duty in the consideration of this case to mete out even-handed justice to the parties to this controversy. The fact that the defendant is a corporation entitles it to no less rights at your hands, and to the same measure of justice, as if it was a private individual. And while we must hold a railroad corporation to the strictest accountability in the discharge of its duties and liabilities, we are also to look to

it that all persons having contract relations with such corporations (as passengers or others to whom it owes a duty) exercise the requisite care and caution for their safety, as the law requires.

Let us now examine the legal aspect of the case, and, in so doing, I shall only detail such portions of the evidence as are necessary to enable you properly to apply the law. There are some undisputed facts in this case. The plaintiff took the through Chicago train on July 19, 1882, at Waseca for Albert Lea, and arrived at the depot of that station about midnight. The depot is located west of the town, and in order to reach the hotel it is necessary to pass over the main track in going from the depot grounds. The plaintiff had paid his fare to the Minneapolis & St. Louis Company, having purchased a round trip ticket from Albert Lea to Waseca and return. On his arrival at Albert Lea he entered a depot wagon, owned by the Hall House proprietor, and submitted himself to the control of the driver, who proceeded to make the crossing and pass over it on his way to town. While crossing, or just at the point of crossing, or at some point while making the attempt, a locomotive belonging to the defendant appeared in view, the plaintiff jumped from the wagon, and the injury was inflicted in the manner detailed to you by the evidence.

The defendant, the Burlington, Cedar Rapids & Northern Company, having by lease the right to use the depot and grounds, and the tracks laid therein, owed the same duty to passengers of the Minneapolis & St. Louis road, who were lawfully at the depot and on the grounds, as it does to its own passengers; and if the injury resulted solely from the careless and negligent manner in which it ran its locomotive over the track where the defendant had the right to be, and was invited to cross, it is liable for damages occasioned thereby. It was the plain duty of the defendant to take such precautions to avoid injury to passengers who travel over this crossing as ordinary prudence would suggest. It

is urged by plaintiff that the defendant did not exercise the requisite care for his safety, and that it was negligent in not furnishing safe and secure egress from its depot; that it did not use the utmost care in providing against the injury which occurred; and that the injury would not have happened with reasonable precautions on the defendant's part to make the egress safe. On the other hand, the defendant says that it owed no duty to this plaintiff which was not carefully and diligently performed, and that all the diligence which was required under the circumstances was used. This presents the issue for you to determine, and the burden of proof is upon the plaintiff to establish it to your satisfaction; that is, the burden of proof is upon him to establish negligence. He is required by the weight of evidence to prove that the cause of the injury was the defendant's negligence.

Now, what was defendant's duty with reference to this crossing, over which travelers were invited to cross in going to and from the depot? It was the duty of the defendant to have a safe passage-way for the benefit of travelers over this crossing; it owed this duty to the plaintiff. He had arrived at the depot at midnight, a dark night, which fact required vigilance on the part of the company to protect him, and demanded the exercise of such care as would be necessary to secure his safe exit from the depot grounds. If it was necessary, in your opinion, from the surroundings, as disclosed by the evidence, in order to secure a safe exit, that the crossing should be lighted, or a flag-man stationed at that point, and if you believe that the injury sustained by the plaintiff was the result of a failure to furnish a light or a flag-man, the failure so to do on the part of the defendant is negligence. On the other hand, if you believe that all the necessary warning was given by the defendant, that the locomotive bell was rung, and that the conductor cried out and gave sufficient warning not to cross, and other employees warned and cautioned the parties that an engine was approaching, and that a light at the crossing or a flag-man was

not necessary to give safe egress to the plaintiff, then such failure was not a want of care and caution on the part of the defendant.

You are to settle this issue, and, from a close examination and consideration of the evidence, satisfy your minds upon this point. If there was no negligence, then the verdict must be for the defendant; if, however, the evidence satisfies you that the defendant was negligent, and this injury resulted from its negligence, then the plaintiff, if free from fault, is entitled to a verdict. The theory of the defendant is that the injury resulted from the negligence of the driver of the wagon. The plaintiff submitted himself to the control of this driver, and if the cause of the injury was the driver's neglect the plaintiff cannot recover. The driver's negligence was his negligence, and he must take the consequence.

The defendant, however, cannot be relieved from the exercise of the necessary care and caution for the protection of the driver. He was not a trespasser. The company knew he was there, and that he could not depart from the grounds without passing over the track at the crossing where this injury occurred. Knowing these facts, the person in charge was required to exercise great caution in running a locomotive over this crossing, and if care for his safe egress was not exercised, the defendant is guilty of negligence; and if his negligence caused the injury, the plaintiff is entitled to a verdict at your hands. It is in evidence that the plaintiff jumped from the wagon at the crossing, either on it or when the driver made an attempt to cross, and that the injury resulted from this act on the part of the plaintiff, and not from the negligence of the defendant. You will remember the evidence as to how and where the plaintiff jumped from this wagon, and I shall not repeat it. I think the rule applicable where contributory negligence is set up as a defense is the one which is to be applied in this case, and this is it: If the plaintiff was placed, by want of care of the defendant, in

such a position that at the moment, and in the face of a great and threatening peril, he was obliged to choose between two hazards, and he makes such choice as a person of ordinary prudence and care, placed in the same situation, might make, and is thereby injured, the fact that if he had chosen the other hazard he would have escaped injury does not relieve the defendant from liability for its own negligence. The question is, was the injury inflicted upon plaintiff the result of defendant's negligence?

I am requested by defendant's counsel to charge you as follows, which I do:

(1) "If Hall was keeping a hotel at Albert Lea at the time of the accident in question, to promote the business of which he carried the patrons of the same in the carriage in question free, and plaintiff was being so carried at the time of the accident, and the accident was caused either wholly by the negligence of the driver of said carriage, or partly by the negligence of said driver and partly by the negligence of the employees of the defendant, the plaintiff cannot recover in this action."

(2) "The plaintiff having entered a conveyance to be carried away from the depot in question, the defendant, and its servants and employees, had a right to suppose that the driver of such conveyance was familiar with the usual manner of backing the engine in question up to the train in question, and the usual perils and dangers incidental to crossing the track in question, and that he would exercise proper care to avoid collision while crossing said track."

Now, if you shall find, upon consideration of this case, that the defendant has been guilty of negligence, then the plaintiff is entitled to a verdict. The next question for you to consider is, what is the amount of damages which the plaintiff is entitled to recover?

Plaintiff is entitled to a reasonable compensation for injuries sustained — a just remuneration for the injury. He is entitled to surgeon's fees, and amount paid for board and

nursing, and a reasonable sum for pain and bodily suffering, and for any permanent injury sustained. And, in arriving at such an amount, you can take into consideration the probabilities of life, and the fact that at the time of the injury he was receiving pay for his services as a traveling salesman; not that you must give him the amount he would receive, but you can take into consideration all these facts in arriving at a just compensation for the injury sustained.

I submit, gentlemen, this special finding, to which defendant's counsel desires an answer:

"Did the defendant use due care to avoid injury to the plaintiff after discovering his proximity to or presence upon the track in question?"

Now, gentlemen, I shall submit this case to you without further remark. It is one peculiarly of fact for a jury to determine, and the issue is a very simple one. We have consumed some little time in order to get at the facts in the case. I think you justly comprehend them, and will consider them as practical business men.

If you find for the plaintiff, you will say, "We, the jury, find for plaintiff, and assess his damages at so much." If you find for the defendant, you will say, "We, the jury, find for the defendant."

It will be entered on the records that you find a verdict for the defendant, the Minneapolis & St. Louis Railway Company.

Jury found a verdict for plaintiff and assessed the damages at $5,000.

THOMPSON, Adm'r, *v.* CHICAGO, M. & ST. P. R'Y CO.

(District of Minnesota. January, 1883.)

1. NEGLIGENCE — FELLOW-SERVANT — LIABILITY OF EMPLOYER. — One who contracts to perform labor or render services for another takes upon himself those risks, and only such, as are usually incident to the employment engaged in, and in the absence of statute the negligence

of a fellow-servant is a risk assumed by the employee, and for which the employer is not liable.

2. SAME — EMPLOYEE UNDER CONTROL OF ANOTHER. — Where the employer places one employee under the control and direction of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger, and thus exposes him to extraordinary peril, of the existence and extent of which he is not advised, the employer is liable.

3. SAME — DANGER KNOWN TO EMPLOYER OR HIS AGENT. — If the employer or his authorized agent leads the employee to expose himself to a danger not ordinarily incident to the employment, which is known to the former and unknown to the latter, whereby the latter is injured, an action lies against the employer to recover damages for the injury.

4. SAME — APPARENT OR KNOWN DANGER. — If the danger is apparent, and is as well known to the employee as to the employer, the former takes the risk of it; but if the employer knew, or by the exercise of ordinary care might have known, that the employment was hazardous to a degree beyond what it fairly imports, he is bound to inform the latter of such fact.

5. SAME — CONTRIBUTORY NEGLIGENCE — RULE OF. — The rule of contributory negligence applies to a case of this character, but with much less force than to a case where a servant is injured in the ordinary course of his employment, and not exposing himself to unusual dangers in obedience to the orders of his superiors.

6. SAME — OBEDIENCE TO ORDERS OF SUPERIOR. — The servant may obey the order of his superior and perform his duty unless the danger in doing so is so apparent that a man of ordinary prudence would refuse to undertake it, even under the orders of his employer.

7. SAME — KNOWLEDGE OF DANGER — A QUESTION OF FACT. — It is a question of fact for the jury whether, under the circumstances of the case, the party injured knew, or in the exercise of ordinary care and prudence might have known, that the danger was extraordinary.

MCCRARY, *Circuit Judge.* — This case is before the court on demurrer to the amended complaint. The action is to recover damages caused by the death of one Christian Olsen, who, according to the allegations of the amended complaint, was killed while in the employment of the defendant, acting under the orders of one Cavinaugh, who was the agent of the defendant, with authority to direct said Olsen in the performance of his duties. It is alleged that said Cavinaugh,

in the exercise of authority conferred upon him by the defendant, ordered the said Olsen into a place of unusual and extraordinary danger, by directing him to excavate earth from an embankment, where, by reason of the fact that a portion of the earth of the embankment was mixed with sand and fine gravel, it was liable to cave off, and fall upon and injure and kill the said Olsen; also, that the dangerous condition of said embankment was known to said Cavinaugh, who was, and for a long time had been, accustomed to and acquainted with such work, and the excavation of earth from said embankment and other similar embankments, and who was fully advised by personal inspection of the character of said bank and the excavation thereof; and who, nevertheless, failed in any way to notify or make known to said Olsen the existence of such danger, or to take any measures whatever to guard against such danger; that said Olsen was not acquainted with such work, or with excavating from or working in or about the said embankment or similar embankments, and did not know the effects of such excavating, and did not know the liability and danger of the earth of such embankments, and especially of this embankment, to cave off and fall down; and that he believed and had reason to believe said bank of earth where he was at work under the orders of said Cavinaugh, as agent of the defendant, was safe and secure, and that he was in no danger of being killed or injured in any way while so working at said place; that said Cavinaugh, well knowing the danger, etc., ordered said Olsen to engage in excavating said embankment, and while so engaged he was killed by the falling of the earth upon him.

It may be useful to restate concisely the rules of law by which this and other similar cases are to be determined:

(1) Whoever contracts to perform labor or render services for another thereby takes upon himself such risks, and only such, as are usually incident to the employment in which he is to engage.

(2) In the absence of statute, the general rule is that the negligence of a fellow-servant is one of the risks assumed by the employee and for which the employer is not liable.

(3) But this general rule has its exceptions, one of which is that where the employer places one employee under the control and direction of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger and thus exposes him to extraordinary perils, of the existence and extent of which he is not advised, the master is liable. This for the reason that, in giving such an order, the superior servant stands in the place of the employer.

(4) If the employer or his authorized agent leads the employee to expose himself to a danger not ordinarily incident to the employment, which is known to the former and unknown to the latter, whereby the latter is injured, an action may be maintained to recover damages for such injury.

(5) If the danger is apparent, and is as well known to the employee as to the employer, the former takes the risk of it; but if the employer knew, or by the exercise of ordinary care might have known, that the employment was hazardous to a degree beyond that which it fairly imports, he is bound to inform the latter of such fact or put him in possession of such information.

(6) The rule respecting contributory negligence applies to a case of this character, but with much less force than to a case where the servant is injured in the ordinary course of his duties, and not while exposing himself to unusual dangers in obedience to the orders of his superior. As applied to cases such as this the rule is that the servant may obey the order of his superior and perform the duty, unless the danger in doing so is so apparent that a man of ordinary prudence would refuse to undertake it even under the orders of his superior.

Applying these rules to the present case, it is apparent that the amended complaint states a cause of action, unless

it can be said that it shows affirmatively that Olsen, at and before the time he was killed, was fully informed of the peril to himself of the services in which he was engaged. The contrary is distinctly averred, and I do not think the court can say, as a matter of law, that in this respect the allegations of the amended complaint are necessarily untrue. It is a question of fact to be left to the jury, whether under all the circumstances the said Olsen knew, or in the exercise of ordinary care and prudence might have known, that the danger was extraordinary. It is averred that Olsen was inexperienced in the business, and was not aware of the peril; and it may be that, upon consideration of all the facts and circumstances, a jury would be at liberty to find that such was the fact. It is true that, ordinarily, every person of mature years and common intelligence is bound to take notice of the law of gravitation, and is presumed to be aware that earth in an embankment, when undermined, will cave in and fall. But the amended complaint avers that the particular embankment at which Olsen was employed was peculiarly and unusually dangerous by reason of the character of the earth; and that this peculiar and extraordinary danger was known to Cavinaugh, and was not communicated to Olsen. These allegations being admitted by the demurrer, I am of the opinion that a question is presented for the consideration of a jury, and that, therefore, the demurrer must be overruled; and it is so ordered.

The following authorities bear with more or less directness upon the questions presented by this demurrer: *Baxter* v. *Roberts*, 13 Amer. Law Reg. 41, and note; *Holden* v. *Fitchburg R. Co.* 37 Amer. Rep. 343; *L. S. Iron Co.* v. *Ericson*, 18 Amer. Law Reg. 28; *Miller* v. *U. P. R. Co.* 4 McCrary, 115; *Dillon* v. *U. P. R. Co.* 3 Dill. 319; *Naylor* v. *Chicago & N. W. R. Co.* 53 Wis. 661 (*S. C.* 11 N. W. Rep. 24); *Davis* v. *R. Co.* 20 Mich. 105, 127.

C. K. Davis and *Colburn & Bassett*, for plaintiff.

Bigelow, Flandreau & Squires, for defendant.

DELGER *v.* CITY OF ST. PAUL.

(District of Minnesota. December, 1882.)

1. MUNICIPAL CORPORATION — NEGLIGENCE — FAILURE TO KEEP SIDEWALKS IN REPAIR. — A municipality having, by its charter and by-laws, charge of the streets and sidewalks, with power to compel by assessment repairs to the same, is bound to keep them in good and safe condition, and will be liable for damages to a person who, without negligence on his part, is damaged by reason of its failure to so repair, provided the city authorities knew the existence of the cause of the injury, or were informed of it, or such a state of circumstances is disclosed that notice would be implied.
2. BURDEN OF PROOF — CONTRIBUTORY NEGLIGENCE TO DEFEAT RECOVERY. — The burden of proof is with the plaintiff to establish negligence. If the plaintiff materially contributed to the injuries by her own negligence, she cannot recover. The law in such cases is well settled, and the question is purely one of facts for the jury.

NELSON, *District Judge.* — The plaintiff brings suit against the city of St. Paul to recover damages for an injury resulting, as she claims, from the negligence of the corporate authorities of the city in permitting a pit or hole to remain open, partly on the street and partly on the sidewalk, into which she fell in the evening while passing from the bridge over this sidewalk leading up a public street in the Sixth ward. The facts are in evidence before you. The city claims the evidence shows that it exercised all the care and caution necessary to make this sidewalk and street safe; that the opening was filled up so that it was sufficient for the purpose for which it was used; and that no negligence of the city authorities is proved. The burden of proof is upon the plaintiff to establish negligence before she can recover. She must show that the city failed to exercise the care and caution required to put this sidewalk in safe condition. The law is well settled, and there is no controversy between the parties upon the legal duties of the city, and the care and caution required of the plaintiff. It is this as applied to the case: The municipality of St. Paul, by its charter and by-laws, has charge and control of the streets and sidewalks. It can open and

authorize the grade of streets, and the construction and repair of sidewalks. By its charter it is furnished with power to compel by assessments the repair of the public streets and sidewalks within the corporate limits, and is required and bound to keep them in good and safe condition. If an opening was left in the street or sidewalk, and the plaintiff coming along in the evening, when dark, falls into such opening or hole without negligence on her part,—that is, without the want of such care and caution as the circumstances require,—and is thereby injured, the city is liable for the damages sustained by the injury thus inflicted; provided the city authorities knew of the existence of the cause of the injury, or were informed of it, or such a state of circumstances is disclosed by the evidence that notice would be implied.

If the plaintiff has been guilty of negligence on her part, which materially contributed to the injury sustained, then she cannot recover. The municipal government would not be liable for an injury which was the result of her own misfortune. This is peculiarly a question of fact, and you will apply the law laid down by the court to this case.

The city authorities, when they had notice of this pit-hole, this dangerous place, would have a reasonable time to repair it, and they claim it was in process of being repaired, and was put in such condition that it was ordinarily safe for passengers. That is for you to determine. If they were repairing it, and it was put in ordinarily safe condition, and no warning was given or light placed to indicate there was any such dangerous hole, the city cannot be excused from liability if the injury happened through such negligence solely. That is the law; and if you find in this case the city was not guilty of negligence, your verdict must be for the defendant. If you find the city was guilty of negligence, and that the plaintiff in this case exercised due care, and has not contributed by her own negligence to the injury sustained, then you will consider the amount of damages which she is entitled to recover. The rule is this: She is entitled to recover

actual expenses, including medical attendance, if any has been proven; if not, then you are to give her such reasonable amount as you think will compensate her for the injury sustained. If any permanent injury is proven, you must award such compensation as you think will remunerate her for that, and also for any mental and bodily distress.

Verdict for plaintiff.

SUN MUTUAL INS. CO. and others *v.* MISSISSIPPI VALLEY TRANSP. CO.

(Eastern District of Missouri. December, 1882.)

1. PLEADING — CORPORATIONS. — Where parties joined as libelants are corporations the libel should so aver.
2. SAME — JOINDER OF PARTIES. — Where goods belonging to different parties are shipped by the same vessel, and are injured by a common disaster caused by the same act of negligence on the carrier's part, the different shippers or their assignees may join in filing a libel in admiralty to recover their damages.
3. SAME. — In such cases the demand of each libelant should, it seems, be alleged in a distinct article.
4. SAME — PLEADING — EXHIBITS. — Where the cause of action set forth in a libel has arisen from the violation of a written contract of affreightment, the libel should so state, and the contract should be annexed to the libel, or a legal excuse for its absence given.
5. COMMON CARRIER — NEGLIGENCE — COLLISION CAUSED BY CARELESSNESS OF PARTIES FURNISHING MOTIVE POWER. — Where A., a common carrier, which owned a line of barges, contracted with B. to convey certain goods on its barges safely from C. to D., the dangers of navigation and collision excepted; and where, while A. was getting together its barges in the harbor of C., preparatory to starting them to D., the barge in which B.'s goods had been placed was brought into collision with another of A.'s barges, through the mutual carelessness of two tug-boats belonging to E., but which were in A.'s employ, and at the time engaged in towing said barges, and B.'s said goods were damaged, — *held*, that the collision was not an excepted peril, and that A. was liable to B. for the damages which he had sustained.
6. SAME — LIMITATIONS. — Suit having been brought against said carrier, upon the cause of action above stated, about twenty-eight months after the collision, *held*, that the demand had not become stale.

In admiralty. Suit for damages.

The libelants alleged in their original libel that they were insurance companies; that respondent was a common carrier, and the owner of a barge line running between St. Louis and New Orleans; that several different lots of merchandise (describing them) insured by libelants had been delivered to respondent, "for the respondent, as common carrier, to receive, take care of, and to safely and securely carry and convey from said city of St. Louis to the said city of New Orleans without delay, the dangers of navigation, explosion and collision only excepted, and there, at the said city of New Orleans, to deliver all the said goods, in like condition and good order, . . . for certain reward to be paid therefor; and that respondent had, as such common carrier, accepted said merchandise for transportation as aforesaid;" that said goods were laden on defendant's barge, New Orleans, which was moored alongside of a warehouse in East St. Louis; that respondent was the owner of another vessel known as barge Fifty-four, upon which respondents had laden a cargo, and which they had moored alongside of an elevator at the city of St. Louis; that defendants, intending to use one of their tow-boats to tow these barges to New Orleans, hired two steam tugs to tow the barges from the places at which they were respectively moored to a point in the harbor of St. Louis at which their wharf-boat and tow-boat were lying; that, in pursuance of that hiring, respondents ordered one of said tugs to go for one of said barges, and the other to go for the other, and tow them to their said wharf; that each of said boats made fast to the barge for which it had been sent, and started for respondent's wharf; but before reaching it the two barges were brought into collision with each other through the mutual carelessness of the crews of said tug-boats, and the merchandise shipped as aforesaid greatly damaged; that libelants respectively paid the consignors of the merchandise insured by them the amount of their losses; and that said consignors assigned

their respective causes of action arising as aforesaid to libelants.

The demands of the libelants were all alleged in the same article. It was not stated whether the contracts of affreightment were written or oral (though they were in fact written), and they were not set out in or attached to the libel; nor was it stated in the libel whether or not libelants were corporations. The collision was alleged to have occurred February 1, 1880. The libel was filed July 22, 1882.

The respondent excepted to the libel on the following grounds, to wit: (1) That libelants had delayed the production of suit for the enforcement of their pretended demands until the same were stale; (2) that the libel was multifarious; (3) that it did not state any cause of action, inasmuch as it was alleged that it was based upon a cause of contract of affreightment, and said libel did not state with legal certainty sufficient facts to show what such contract was, and did not state facts sufficient in law to show that respondent ever made a contract of affreightment with libelants, or that they have any cause of action upon any contract of affreightment against respondents; that said libel did not state facts authorizing libelants to sue upon any contract of affreightment, nor facts showing any breach of contract of affreightment upon which it is liable to libelants; that said libel mingles in an inextricable manner in one statement several distinct alleged and pretended causes of action (not describing either with legal certainty), which cannot be so united and pleaded; that said libel was not drawn with sufficient certainty and precision to enable the respondent to answer same with safety; and that it is vague and indefinite, and violative of the rules of admiralty pleading requiring particularity and certainty.

O. B. Sansum and *Brown & Young*, for libelants.

Given Campbell, for respondent.

TREAT, *District Judge.*—1. It appears from the verification that each of the libelants is a corporation; and, if so, the libel should so aver.

2. If the contracts of affreightment were in writing the libel should so state, and annex the same, or give a legal excuse for not so doing. According to the libel there was a common disaster, whereby the injury was done to the property named, belonging to different owners, to whose rights, respectively, these libelants separately succeed. Their right to join in the action is within the reason of the rule laid down in collision, and other cases, to prevent multiplicity of suits resting on a common ground. If it be found true, as averred, that the same act of negligence caused the injury to each, nothing will remain other than to ascertain the extent of damages sustained by each owner, and to enter a decree accordingly. In other than admiralty proceedings such joinder would be inadmissible.

Rule 23 in admiralty states the general mode of pleading, under which there may be some doubt whether the interest or demand of each libelant should not be alleged in a distinct article, so that the respondent may answer thereto as the facts justify, for it may be very different defenses exist.

The exceptions will be sustained as to the three points here stated, and leave granted to amend accordingly.

The exceptions as to all other points are overruled.

An amended libel was thereupon filed, to which were attached as exhibits bills of lading for the goods alleged in the libel to have been damaged. The bills of lading each contracted to deliver the merchandise described therein without delay at New Orleans, "*the dangers of navigation, fire, explosion and collision excepted.*"

TREAT, *District Judge.*—The libelant, subrogated to the rights of several shippers and consignees, claims, under respective contracts of affreightment, that the respondent is

answerable for the non-delivery of the goods shipped. The bills of lading contain the excepted perils as to the dangers of navigation, etc.

The facts are, briefly, that many goods were shipped on respondent's barges in the port of St. Louis, one of the barges being on the Missouri shore and the other on the Illinois shore and above the bridge. The respondent had its barges at different points in the port for the purpose of being loaded, and when so loaded employed harbor tug-boats to tow them to respondent's wharf-boat, where the general tow was made up for the purpose of transporting or towing the fleet of barges down the Mississippi river to their destination. In the course of respondent's business two tugs were sent by it above the bridge — one to the Illinois shore and one to the Missouri shore,— each to tow respectively a specified barge to respondent's wharf-boat. It so happened that the respective tug-boats, in the attempted performance of their duties, collided, whereby the damages complained of were caused. The contention has been, and a large amount of evidence taken, that the tugs were not in fault, but the accident was inevitable, or a peril of navigation; or, if that be not so, that the tug-boats, one or the other, or possibly both, were in fault, and they or their owners are alone liable for the damages.

From the evidence, both were in fault; but whether this is so or not is unimportant in this case, for each belonged to the same owners, and this is not a suit *in rem* against either, nor is it a suit *in personam* against the owners of the tugs.

The sole question is whether, under the contracts of affreightments, such employment of the tug-boats, and a disaster caused by the misconduct of one or the other, exonerates the respondent from his liability, and drives the shippers to a suit against the tug-boats and their owners.

Under the affreightment contracts the goods shipped were to be delivered safely at New Orleans, with the excepted perils reserved. The shippers were not concerned with nor

to be affected by the motive force to be employed by the respondent. The latter had a legal right to use one or another tow-boat for its purposes at any stage of the voyage. When the cargo was delivered on the specified barge, and the bill of lading received therefor, the duties of transportation were assumed by the respondent. The latter's mode of gathering together several barges from different places, to make up a general tow or fleet for its own convenience, was no part of its contract with the shippers—they may have been residents of far-distant places forwarding their goods to St. Louis for transportation to New Orleans. Once delivered under proper bills of lading to respondent, they had a legal right to rely on their contracts, irrespective of contracts with other shippers, or with arrangements that respondent might make for its own convenience. Whatever respondent did, after receipts under its bill of lading, it did at its own costs and for its own purposes. It might employ one or more tug-boats or tow-boats, as it deemed best; but it could not thereby escape the obligation of its contracts with the shippers, nor remit them to the sole responsibility of such tug-boats.

This is not a case of collision where a third party pursues the wrong-doer, nor where a tug-boat seeks to escape the consequence of its own wrong. Whether an action would lie against the tug-boats employed by the respondents need not be discussed, for the sole question here pertains to the original and continued liability of the respondent, despite the agencies it employed.

The evidence concerning the duties of harbor tugs with respect to tow-lines and lookouts, or of respondent's duties with respect thereto, cannot affect the question under consideration. It was the duty of respondent to do, or cause to be done, whatever was needed for the safe transportation of the shippers' property; hence, no act of negligence by the harbor tug will, as against the shippers, excuse the respondent. It may or it may not be that the respondent has a

cause of action against the harbor tugs for the injury done the shippers, and might have maintained a suit therefor, originally, for such injury to said shippers, and to its own barges. The special question is, when, according to the necessities or custom of a port, an injury is caused by a tug employed by a vessel, is the tug to be visited solely with the loss, and the vessel towed to be exonerated, irrespective of the bill of lading; or whether the vessel on which the goods are shipped is liable to the shippers, leaving it to its redress against the tug? It may be that the shippers had a cause of action against the tug, and that the respondent could have maintained such an action for itself and the shippers; yet the question recurs whether, under the contracts of affreightment, the respondent is not liable for injuries caused through the misconduct of its own agents. Nothing except a peril of navigation, etc., would excuse the respondent. If a collision is such a peril, when the fault is solely of another colliding vessel, can the faults or negligences of tugs employed by the respondent under the circumstances stated be considered as perils external to itself, which it could not and ought not to control? In other words, ought not the action of the tugs to be considered the action of the respondents, just as positively as if the loss had occurred after the fleet had been made up and was proceeding on its way with respondent's tow-boats in charge, through whose fault the loss occurred? Under the latter supposition, the negligence of respondent's tow-boat would work no excuse; and so if one or more harbor tugs were used by it, and through the negligence of one or the other, or both, the vessel bound by the contract of affreightment failed to fulfil the same, the loss is one for which it is responsible.

The many cases cited refer to injuries where third parties suffer from collisions, vessels being in tow of harbor tugs. The case under consideration is clearly distinguishable in principle, for here the shipper sues on his contract of affreightment, and the respondent can be discharged from

its obligation only by proof of an excepted peril. Instead of proving a loss by an excepted peril, the evidence shows a loss through the negligence of its own agents — one or both of the tug-boats.

The court holds that the respondent is liable, and decrees accordingly, and orders that the case be referred to William Morgan to report the amount of the loss sustained under the contracts of affreightment.

HARDIN *v.* OLSON.

(District of Minnesota. December, 1882.)

1. REMOVAL OF CAUSE.— A cause is not removable from a state to a federal court, if it could not have been originally instituted in the federal court by the plaintiff as assignee of the instrument sued on.
2. NEGOTIABLE INSTRUMENT — UNCERTAINTY IN.— Where the instrument is uncertain as to amount and time of payment of attorney's fees to be paid in case of suit brought on the note, and uncertain as to the person to whom payable, and dependent on the contingency of the bringing of suit thereon, it is not a negotiable instrument under the laws of Minnesota.

On motion to remand.

Suit instituted in the United States court by plaintiff as assignee of the instrument sued on, which was in the form of a negotiable promissory note, except that it contained an agreement by the maker to pay ten per cent. of the principal as attorney's fees in case suit should be brought upon it. Cause removed to this court on the ground of the citizenship of the parties. Motion to remand on the ground that the instrument is not a promissory note, negotiable by the law merchant, within the meaning of the first section of the act of congress of March 3, 1875, and therefore not an instrument on which the assignee can sue in this court without showing that the suit might have been maintained there by the assignor.

James Quirk and *John M. Gilman*, for plaintiff.

Collister Bros. and *Lewis & Leslie*, for defendant.

McCRARY, *Circuit Judge.*—The note sued on was executed and made payable in the state of Minnesota, and is therefore to be interpreted according to the laws of that state; and in determining the question as to whether it is to be regarded as a promissory note, negotiable by the law merchant, within the meaning of the act of congress of March 3, 1875, it is proper to inquire what is the law of the state upon the subject, as determined by its supreme court.

It has been held that a state statute, defining the requisites of a negotiable promissory note, will be followed by a federal court sitting in that state in construing a contract made and to be performed therein. *Gregg* v. *Weston*, 7 Biss. 360. The same rule should, we think, obtain where the law of the state has been declared by the adjudication of its highest judicial tribunal. The parties are presumed to have contracted with reference to the law of the state in which their contract was made and to be performed, whether that law has been settled by legislative enactment or by judicial decision.

The question, therefore, is whether the instrument sued on is a negotiable promissory note according to the law of Minnesota. It is not claimed that there is any statute upon the subject, but it is insisted that the question has been decided by the supreme court of the state in the case *Jones* v. *Radatz*, 27 Minn. 240 (*S. C.* 6 N. W. Rep. 800). That was a suit upon a promissory note in the usual form, except that it provided for payment by the maker of "reasonable attorney's fees if suit should be instituted for its collection." It was held not to be a negotiable promissory note, the court saying:

"Stipulations collateral to the obligation, such as relating to security, or to the remedy to enforce the obligation, have been held not to affect the negotiable character of the in-

strument. But we know of no case which concedes that the fixed character of the obligation may be changed, either by making it uncertain as to amount or time of payment, or person by whom or to whom payable, or by making it depend to any extent on a contingency without depriving the instrument of the negotiability. Certainty in these respects is essential to negotiability."

It is manifest that the instrument sued on in the present case is not a negotiable promissory note within the rule laid down in this decision. The instrument is uncertain as to amount, for the ten per cent. attorney's fees is only to be paid in case suit is brought upon it; it is, as to the attorney's fees, uncertain as to time of payment, for such fees are only to be paid after suit, which may be brought at any time within the statute of limitations. It is uncertain as to the person to whom payable, because we must presume that payment of attorney's fees is to be made to whomsoever as attorney shall bring suit; and it is uncertain, because it depends upon a contingency, to wit, the bringing of a suit. It has, it is true, one element of certainty not found in the instrument passed upon by the supreme court of Minnesota: the amount to be paid as attorney's fees is fixed in the present case, while it was left indefinite in that case. But all the other elements of uncertainty remain, and they are sufficient, according to the law as declared by the supreme court of this state, to deprive the instrument of its negotiability. Without, therefore, determining what construction should be given to the instrument sued on, in the absence of any settled rule having the force of law within the state where the contract is made and to be performed, and without reviewing the conflicting authorities upon that question, we think it proper, in the present case, to follow the decision of the supreme court of Minnesota, and to hold the instrument non-negotiable.

Following the rule laid down in *Berger* v. *County Com'rs*, 2 McCrary, 483, we must also hold that the cause was not

removable, because it could not have been originally instituted in this court by the plaintiff as assignee of the instrument sued on.

The motion to remand must be sustained. So ordered.

CANFIELD *v.* MINNEAPOLIS AGRICULTURAL & MECHANICAL ASSOCIATION and others.

(District of Minnesota. January, 1883.)

1. CORPORATION — STOCK — PLEDGED AS COLLATERAL — SALE OF.— When stock is pledged as collateral security by delivery of the certificates with blank transfer on the back, signed by the owner, and the principal indebtedness is past due, the pledgee can sell the stock as the readiest mode of collection, giving the pledgor and his successor in interest reasonable notice to redeem, and of the time and place of sale.
2. SAME — ABSOLUTE OWNERSHIP — HOW ACQUIRED.— The pledgee, a bank, improperly purchased the pledge through an agent. *Held*, that nothing passed by such form of sale, and the bank still holds the pledge by its original title as collateral security, and only a *bona fide* purchaser from the bank could subsequently acquire absolute ownership of the stock.
3. SAME — RECOVERY OF LAND REPRESENTED BY THE STOCK.— When the pledge is stock of an association, having no other corporate property than real estate, *held*, that the complainant, who had succeeded to all the rights of the original pledgor, could recover the land by a suit in equity, on reimbursing the grantees, who obtained their title with notice of his rights and equities, the amount they are actually out of pocket.
4. SAME — ACCOUNTING OF RENTS, PROFITS AND INCOME.— To arrive at such sum an account must be had of rents, profits and income received by such grantees while in possession of the real estate.

In equity.

The complainant, a citizen of Vermont, in 1877, brought this suit in equity against the defendants, citizens of Minnesota, and in November, 1880, an amended and supplemental bill was filed, praying the court to confirm the title in him to certain shares of stock of the defendant association,

and also the title to all the land which the stock represented except five acres, and issue was joined.

The facts found are these:

In June, 1871, the defendant, the Minneapolis Agricultural & Mechanical Association, was organized under the laws of the state of Minnesota as a body corporate, and its chief business was the holding of fairs and other public exhibitions. The capital stock was $40,000, divided into eight hundred shares of $50 each, and the corporation subsequently acquired the title to seventy acres of land situated in the county of Hennepin, in this district, described as follows, to wit: the N. W. ¼ of the N. E. ¼ of section 36, in township 29, of range 24, and the W. ½ of the N. E. ¼ of the same section.

Previous to August, 1873, five acres of this tract had been transferred to the Minneapolis Harvester Works, for which no claim is asserted. The association held no corporate property other than the real estate above mentioned, and prior to April, 1873, William S. King had become the owner of the eight hundred shares representing the entire capital stock.

On November 5, 1872, King purchased two hundred shares of this stock from George A. Brackett, and gave his notes in the sum of $14,000, due one year from date, for the purchase money, and Brackett retained the stock in pledge for payment. On November 12th of the same year King also purchased from R. J. Mendenhall one hundred shares of the stock for $6,250, giving his notes for the purchase money, and this stock was held in pledge for their payment. In September, 1873, Brackett borrowed, on his note, $10,000 from the State National Bank of Minneapolis, and turned over as collateral security the King notes for $14,000, and repledged the stock accompanying them, and about this time the bank also took from Mendenhall the King notes for $6,250, and the one hundred shares of stock pledged therewith. The pledge of the stock, in all instances, was made

by a delivery of the same with blank transfer indorsed on the certificates, signed by the party to whom they were issued. King's title to the eight hundred shares of stock was obtained by such delivery to him, and no transfer was made upon the books of the corporation.

On July 19, 1873, King pledged the remaining five hundred shares to R. J. Baldwin, at that time cashier of the said State National Bank, to secure him personally for the return of $10,000 gas stock then loaned by him to King, and King also authorized Baldwin to hold these shares as further security for his notes to Mendenhall and Brackett, then held by the bank. The transfer of this stock was also made by delivery of the certificates as above mentioned.

On August 14, 1873, the complainant in good faith, without notice of the stock being pledged, purchased of King the real estate above described, being all the corporate property of the association, and the following agreement in writing was executed:

"I will sell to Thomas Canfield the property known as the fair grounds, in Minneapolis (excepting five acres subscribed to the stock of the Minneapolis Harvester Company), for the sum of $65,000. I will receive in payment therefor $65,000 of the 7.30 gold bonds of the Northern Pacific Railroad Company, at the rate of ninety cents on the dollar, and the balance in the notes of hand of the said Canfield, payable in equal instalments, one, two and three years from date, with interest at the rate of ten per cent. per annum. In case the said Canfield shall, at the end of one year from date, prefer to have said notes surrendered, and in lieu thereof allow me one-half the profits from the sale of said property, after paying back to said Canfield the sum of $59,500, together with interest upon the same at ten per cent. per annum, and all taxes and expenses incurred in improving and managing the property, then I am to surrender said notes without interest. This proposition is based upon the supposition that there are seventy acres in said tract before deducting the five acres

before mentioned. In case there is not so much the consideration to be in proportion. I am to procure abstract of title and perfect the same, and execute a warranty deed at as early a day as possible. All buildings and other materials to go with the land except the building sold to the harvester company.

"August 14, 1873. W. S. KING.

"I accept the above proposition, and will pay as provided in the foregoing agreement when the proper deed is delivered.

"August 14, 1873. THOMAS H. CANFIELD."

King, without informing the complainant that this stock was pledged, verbally agreed to transfer the stock to complainant and procure a deed to him from the association. In order to carry out his agreement, King procured a deed to be executed by the several directors, in form one of bargain and sale, purporting to be a conveyance of the real estate by the association to the complainant. This deed is signed as follows:

"THE MINNEAPOLIS AGRICULTURAL & MECHANICAL ASSOCIATION. [SEAL.]

"By" [Directors' signatures.]

Among those signing as directors are the defendants Dorilus Morrison and George A. Brackett.

The sale of the property was not authorized at any meeting of the board of directors, nor was the deed directed to be executed, or the corporate seal authorized to be attached thereto, at any meeting of said board; and this conveyance was declared void and of no effect as against the bank by the supreme court of the state of Minnesota in a suit between it and complainant.

On September 12, 1873, at the city of New York, King delivered to Canfield this deed, together with a warranty deed of the same property executed by himself, and an abstract of title, but did not transfer any of the said eight hundred shares of stock. At the same time complainant delivered to King $65,000 in Northern Pacific bonds, and

further complied on his part with the terms of the agreement. These deeds were duly recorded October 4, 1873.

On July 16, 1877, no part of the King notes to Brackett and Mendenhall had been paid except two years' interest on the Mendenhall notes and on Brackett's note, which was then past due — $7,000.

The gas stock had then been returned, and the bank held all the eight hundred shares of stock pledged for the payment of King's notes and the balance due upon Brackett's note. The bank's claim being $13,000, it proceeded to sell the eight hundred shares pledged, and gave public notice of the time and place of sale, and also served personal notice on King and the complainant. After several adjournments the entire eight hundred shares were offered by the auctioneer and struck off and sold to one James M. Knight on his bid of $13,000, which was made and the amount of the bid paid as follows: The State National Bank was in process of liquidation, and the King and Brackett notes, among others, had been placed in the control of Baldwin, who had retired as cashier, but was still a stockholder and had the charge of the sale of the pledged stock. Baldwin, just before the sale, informed Harrison, the president of the bank, that it was necessary to have some one bid to the amount of the bank's claim, $13,000, and gave him a memorandum of the computation. Harrison immediately requested his son-in-law, Knight, to attend the sale and bid that amount. Knight had no money, and so informed Harrison, but the latter told him that he could give his check on the State National Bank for the amount, and when Knight said: "The bank will not take the check," he replied: "Perhaps it will if I indorse it." Knight paid no money at the time and the check never was returned to him, nor did the stock pass from the control of Baldwin.

It is not clear that Harrison's check was charged up against him, although he was the largest stockholder and had some $80,000 on deposit; but the amount of the check was subse-

quently paid as hereafter stated. Shortly afterwards Morrison gave his notes to Knight for the aggregate amount of $12,430.42, and nine-tenths of the eight hundred shares of stock were, by a written agreement, transferred to him. Baldwin drafted the agreement and had charge of the shares of stock at that time and arranged the manner in which Knight's one-tenth interest should be noted on the stock, signing Knight's name (per Baldwin) upon one of the certificates, by which his interest therein could be ascertained. The Morrison notes were given Baldwin, who took them in part payment of Knight's check, leaving a balance still due.

After this transaction a meeting of stockholders of the association was held and new directors were elected, who resolved to sell and deed the corporate property to Morrison and Knight, and on February 23, 1878, the association made, executed and delivered a deed of an undivided nine-tenths of said lands to Morrison, and one-tenth of the same to Knight. Morrison knew, when the agreement of sale for the stock was entered into, all about the transaction between King and complainant, and had executed, as director, a conveyance purporting to be a deed of the corporation, to perfect the title. He also agreed to pay the expenses incurred by the bank and Baldwin in a litigation between them and the complainant about the stock and the land, which were not a lien on the stock, and for the payment of which Knight was not liable. The Morrison notes were held by the bank, and not paid except as stated hereafter.

A fair was held on these grounds in 1878, which proved a financial failure, and, on an appeal to the citizens of Minneapolis, $30,000 was raised to pay up the deficiency and relieve the real estate from Morrison's claim. Out of this fund the Morrison notes were paid, partly in cash and partly in individual notes, among which was Morrison's for $3,000, the amount of his subscription.

It was the understanding between the citizens who subscribed and Morrison that his interest in the land was only

an incumbrance upon nine-tenths thereof, and he conveyed such interest to Sidle and Langdon, October 22, 1878, who declared a trust to most of the subscribers to the fund. Sidle and Langdon knew of the complainant's equity and the pending litigation, and that Morrison's interest was regarded by him as an incumbrance only. King, the original pledgor of the stock, had possession of the real estate for the purpose of holding fairs and exhibitions for the years 1877, 1878, 1879 and 1880.

E. C. Palmer and *Chas. E. Flandreau*, for plaintiff.

Wilson & Lawrence and *Morrison & Van Norman*, for defendants.

NELSON, *District Judge.*— Upon the facts, as I understand them, the question presented is not difficult of solution, although the transactions are somewhat complicated. The State National Bank, on July 16, 1877, held as collateral security for the payment of King's notes the eight hundred shares of stock which represented the entire corporate property of the Minneapolis Agricultural & Mechanical Association, comprising seventy acres of land, and had a right to sell the pledged stock, all the notes being past due and unpaid. It proceeded to give reasonable and proper public notice of the time and place of sale, and specially notified the pledgor and the complainant, who had succeeded to all his interest therein. At the sale the stock was struck off to Knight, the son-in-law of the president of the bank, who had been requested to bid the amount of the bank's lien — $13,000. It is very clear this bid was for the benefit of the bank, and was so regarded by the president and its agent, Baldwin. The conduct of Baldwin in subsequent transfers of the stock after the sale can be accounted for in no other satisfactory manner. He drew the agreement of sale to Morrison of nine-tenths of the stock, providing for the pay-

ment of the expenses of certain litigation incurred by the bank and himself, for which Knight was not liable, and by *memoranda* upon one of the certificates designated the number of shares therein reserved under the sale to Morrison, signing thereto Knight's name, which indicates that he had not parted with the control of the stock.

There is no clear and certain testimony that Knight ever had anything to do with the pledged stock or the corporate property, except in connection with Baldwin, who represented the bank. Knight testifies that "Harrison or Baldwin delivered the stock to him at his store about the time he purchased." Harrison says: "I don't know to whom the stock was delivered after it was bid off. Baldwin attended to these matters as agent of the bank." "He (Knight) never paid any money to me on account of that bid. I don't know what he did outside of that." Baldwin says: "I had nothing to do with the receiving or application of the proceeds of the sale. . . . I made the sale and turned the matter over to the proper officer of the bank." On his subsequent examination it is assumed that he had previously testified that he delivered the stock, and he then states that Knight had the stock for a long time. It is clear, however, that it never passed entirely from Baldwin's control, even if it was in Knight's possession. Knight paid no money at the time of the sale, but gave his check on the bank, where he had no deposit, at the request of Harrison, who indorsed it, and this check was accepted by the parties in interest. It is uncontroverted that neither Baldwin, Knight nor Harrison knew what became of this check. Dean, who was the cashier at the time of the sale, is of the impression that the check was entered upon the books as proceeds of the sale, but it is evident, from an examination of his whole testimony, that he knows nothing certain about it. The conclusion is irresistible that the bank was the purchaser, and it is elementary law that nothing passed by such form of sale, and it still held the stock under its original title as collateral security.

After the sale Brackett's note was returned to him, together with King's notes for $14,000, which had been pledged for its payment; but this cannot change the situation. The complainant's right to redeem from the bank or set aside the sale after such form of foreclosure is not doubtful. Has anything subsequently transpired which will prevent him from asserting his equitable right to the corporate property?

2. Dorilus Morrison, who was one of the original directors of the association, purchased, as he says, nine-tenths of the stock from Knight. He had previously, as such director, executed a deed to the claimant, purporting to convey, on behalf of the association, the corporate property. He knew all about King's sale to complainant, and executed this deed at his instance, in order, if possible, to perfect the title. When the agreement for sale between him and Knight was signed, Baldwin, the agent of the bank, was present, drew up the bill of sale and managed the transfer and delivery of nine-tenths of the stock, in which Morrison agreed to pay the liability of the bank incurred in litigation about the stock, which was neither a lien nor a condition of sale imposed by Knight. His conduct subsequently in connection with the stock and the corporate company clearly shows that he never regarded his interest any more than a lien for the protection of advances made by him. In fact, he paid no money to Knight; but when the agreement was executed gave his notes for $12,430.42, which Knight turned over to Baldwin, and these notes were subsequently paid out of a fund subscribed by certain citizens of Minneapolis. He was a purchaser with notice, and his right to hold the stock as against the complainant is no better than Knight's or the bank's. The conveyance by the association to Knight and himself of the entire corporate property did not change his relation to the complainant. It virtually dissolved the corporation, but the grantees acquired no right thereto superior to that they before possessed.

3. The trustees, Sidle and Langdon, are not *bona fide* pur-

chasers for value. They knew all about the property — its complications, and the previous and pending litigation. Their desire was to make up the deficiency resulting from the fair of 1878, which was a failure financially, and at all the conferences between citizens who afterwards subscribed to the fund of $30,000 to pay off debts, it was understood that Morrison, who was present and participated in these meetings, only desired that his notes, then outstanding, should be provided for, and that he would deed the property for about $14,000, which was the amount then due thereon. In fact, the representation of King to Sidle and others of the deficiencies due embraced this item of $14,000, and the declaration of trust by Sidle and Langdon speaks of incumbrances, which, in my opinion, refers to the Morrison interest.

4. While Sidle and Langdon took the title to the land with notice of the complainant's equity, and could not by a declaration of trust affect it, yet the complainant, in my opinion, is liable to them for the money actually paid Morrison for his interest, which was $8,646.55, and they must account to him for any income, profits or advantages derived from the use of the property.

My conclusion is that complainant is entitled to a decree in his favor requiring James M. Knight, upon the payment to him of the sum of $569.58, to execute to the complainant a conveyance of one-tenth of the said real estate, and Jacob K. Sidle and Robert B. Langdon to account for the rents, profits and income of said real estate while in their possession, and to pay over to complainant the excess, if any there be, of the same over and above said sum of $8,646.55, and to convey nine-tenths of said real estate to complainant. But in case said sum of $8,646.55 shall exceed such rents, profits and income, then to execute such conveyance upon the payment of the balance to them by complainant. And that upon the failure of the said Knight to execute such conveyance within ten days after the pay-

ment or tender to him by complainant of said $569.58, that such decree stand as a conveyance. And upon the failure of said Sidle and Langdon to make such accounting within ten days after the service of notice on them to appear before the master for such purpose, or to execute said deed within ten days thereafter, or after the payment or tender to them of the excess of said sum of $8,646.55, over said rents, profits and income, in case there is an excess, that such decree stand as a conveyance from them.

The case will be referred to H. E. Mann, as master, to take the accounting provided for. Let a decree be entered accordingly.

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8. BANKRUPTCY — LIMITATION OF ACTION — REV. ST. § 5057. — Where a deed of trust upon real estate, executed by A. to secure certain promissory notes, was foreclosed by B., who, as assignee in bankruptcy of the estate of C., held one of said notes, and all parties in interest were present or represented at the sale under said deed, and B., with the sanction of the court by which he had been appointed, became the purchaser for the benefit of C.'s estate, and with the knowledge of A. paid the holders of the other notes their *pro rata* of the purchase money, *held*, that proceedings instituted by A. against B. more than two years after the date of said sale, to set it aside, were barred by the limitations of the bankrupt act. *Phelan* v. *O'Brien*, 466

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4. COMMON CARRIER — NEGLIGENCE — COLLISION CAUSED BY CARELESSNESS OF PARTIES FURNISHING MOTIVE POWER. — Where A., a common carrier, which owned a line of barges, contracted with B. to convey certain goods on its barges safely from C. to D., the dangers of navigation and collision excepted; and where, while A. was getting together its barges in the harbor of C., preparatory to starting them to D., the barge in which B.'s goods had been placed was brought into collision with another of A.'s barges, through the mutual carelessness of two tug-boats belonging to E., but which were in A.'s employ, and at the time engaged in towing said barges, and B.'s said goods were damaged, — *held*, that the collision was not an excepted peril, and that A. was liable to B. for the damages which he had sustained. *Sun Mut. Ins. Co.* v. *Miss. Valley Transp. Co.*, 636

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2. CONSTITUTIONAL PROVISIONS — SCOPE AND EFFECT OF — WHEN SELF-EXECUTING.— The constitution of Colorado imports that railroads in the state are to be operated in conjunction for the convenience of the public, at least to the extent usual and customary between connecting lines in the control of companies not hostile to each other. A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced. *Id.*

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1. CONSTRUCTION OF ORDINANCE — PUBLIC BUILDINGS OF THE CITY — SCHOOL BUILDINGS. — An ordinance of Kansas City provides that the city may use and the water-works company shall supply water from its works "for use in all public buildings and offices of the city." *Held*, that the public school buildings of the city were included. *Nat. Water-Works Co.* v. *School Dist. No. 7 of Kansas City*, 198

2. CONTRACT — CONSTRUCTION ADOPTED BY THE PARTIES — CORPORATION. — The construction given to a doubtful provision by the parties to a contract, and affecting their interest only, often influences courts in their judgment, upon the reasonable presumption that the parties to a contract are in a condition to best know what was meant or intended by it, and, moreover, likely to guard their interest. But the rule has less force when applied to corporations which act through officials, who often have but a general public interest in the matters intrusted to them, and this is especially true of municipal corporations. *Id.*

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1. ILLEGAL CONTRACT — RIGHTS OF PARTIES INTER SESE. — When several persons enter into an illegal contract for their own benefit, and the illegal transaction has been consummated and the proceeds of the enterprise have been actually received by one of such parties and carried to his credit so that he can maintain an action therefor without the aid of the illegal transaction, he may be entitled to relief. The question in such a case must be, can the plaintiff maintain his action without enforcing the illegal contract? *Cook et al.* v. *Sherman*, 20

2. CONTRACT — MENTAL CAPACITY. — The more modern rule is, that in order to set aside a contract upon the ground that the party making it was of unsound mind, it is only necessary to show that he was of such weak and feeble mind as to be incapable of comprehending its nature, or of understanding and acting in the ordinary affairs of life. *Edwards, Trustee*, v. *Davenport*, 34

3. CONTRACT OF PERSON NON COMPOS MENTIS — NOTICE. — A contract entered into by a person of unsound mind is absolutely

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void and not merely voidable, and cannot be enforced by showing that the other party to the contract had no notice of the want of mental capacity. *Dexter* v. *Hall*, 15 Wall. 9. *Id.*

4. CONTRACT. — SALE — STATUTE OF FRAUDS — DELIVERY TO COMMON CARRIER. — A delivery of goods by a vendor to a common carrier is a delivery to the vendee, though such carrier was not designated by him, and under the provisions of the Iowa statute of frauds, that no evidence of any contract for the sale of personal property is competent when no part of the property is delivered and no part of the price paid, such a delivery is sufficient to take the contract without the statute. *Bullock & Co.* v. *Stcherge & Swind*, 184

5. EXECUTORY CONTRACT — DEATH OF PARTY THERETO, EFFECT OF. — On the fifth day of March, 1880, George B. Robinson executed and delivered to plaintiffs' assignor options for stock as follows: "For value received, D. F. Verderal may call on me for five hundred shares of the capital stock of the Robinson Consolidated Mining Company, at five dollars per share, at any time until January 1, 1881. The bearer is entitled to all dividends declared during the time.

(Signed) "G. B. ROBINSON."

Upon the contracts were imprinted words signifying that they were redeemable at the American Exchange National Bank, New York. Robinson died early in December, 1880. After his death and within the time prescribed in the contracts, but before administration on the estate of Robinson, plaintiff appeared at said bank, demanded the stock and tendered payment therefor, which was refused. After letters of administration plaintiff sues, etc.

Held, that the agreements were merely executory, and no right to action had accrued thereon at the time of Robinson's death. At that time something remained to be done by both parties; one of them having become incapable of acting, it follows that the agreement could not be executed until administrators were appointed. The administrators are not bound, no demand having been made on them within the time limited by the contract or at any time. *Prince* v. *Robinson*, 295

6. CONTRACT — PRIVITY. — An agreement by a vendee, with a vendor, to pay to a third party an incumbrance upon the property sold, is not a contract upon which such third party can sue. *National Bank* v. *Grand Lodge*, 93 U. S. 123. *Neb. City Nat. Bank* v. *Neb. City Gas Light & Coke Co.*, 319

7. COMMON CARRIERS — JOINT CONTRACTS. — Where three railroad companies having connecting lines of road, and a steam-ship company connecting with the terminal line, entered into a con-

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tract with A. to transport certain property over their roads and upon said steam-ship company's vessels from X. to Z., and A. suffered loss through the negligence of one of said contracting parties in transporting said property, *held*, that said companies were jointly liable, notwithstanding the fact that the bills of lading under which said property was shipped were signed by the agent of said companies "severally but not jointly," and although said bills of lading provided that "in case any loss, detriment or damage is done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage;" that the liability of said roads should cease upon their delivering said property to said steamship company in safety, and although said bills of lading contained the following clause, viz.: "NOTICE. In accepting this bill of lading the shipper, or agent of the owner of the property carried, expressly accepts and agrees to all its stipulations and conditions." *Milne* v. *Douglass*, 368

8. SALE AND DELIVERY — TIME CONTRACTS. — The purchase or sale of wheat to be delivered at a future time is a fair contract if the intention of the contracting parties is to deliver the wheat, although it is not in their possession at the time of the contract of sale; but if the intention is not to deliver, but to settle differences between the contract price and the then market price, the transaction is illegal and void. *Bartlett et al.* v. *Smith*, 388

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10. SAME — SALE OF PROPERTY NOT ON HAND. — It is not necessary, in case of a sale or purchase of property for future delivery, that the property shall actually be on hand at the time. *Id.*

11. CONTRACT — MUTUALITY OF INTENT. — A contract which is valid in law cannot be rendered illegal by the mere intention of one of the parties to the contract to do something which, if mutually intended, would render it invalid. *Id.*

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12. RELEASE TO ADMINISTRATOR, RATIFYING SALE OF LANDS — FAILURE TO RESCIND, CONTRACT VOID — LACHES, ETC. — Decedent, in his life-time, was possessed of a certain interest in lands which he held with others. His acting administrator, who owns a part interest in the same lands, obtains the assent of two of decedent's heirs to the sale of decedent's interest in the said land, and forthwith conveys the same to himself and his associates. Thereafter all decedent's heirs, including the complainants, sign a release discharging him from all liability "on account of the assets and property of the deceased in his possession or under his control." In the suit brought by two of these heirs against the acting administrator and his associates, purchasers of the land aforesaid, asking for an accounting of proceeds of sales made by them, and for a conveyance to complainants of the undivided interest in the lands still unsold, *held*, that the release from the heirs of decedent to the administrator, considered in the light of a sale of their interest in the lands by such acting administrator to himself and associates, or as an agreement ratifying such a sale previously made by him, was wholly invalid, and that this being so, and it not appearing that the complainants accepted any benefit from the sale after the facts were known, they are not estopped to assert the invalidity of the sale by reason of laches, failure to rescind, and the like. *Latham* v. *Barney*, 587

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1. CORPORATION — CONTRACT — INTEREST OF OFFICERS OR DIRECTORS — PUBLIC POLICY. — A contract entered into by officers and directors of a railroad company to buy lands, and to afterwards locate the line of a projected railroad, and its depots and stations, on or near such lands, is contrary to public policy, and will not be enforced or made the basis of relief in a court of equity. *Cook* v. *Sherman*, 20

2. DIRECTORS — NATURE OF THEIR OFFICE AND DUTIES. — Directors are *quasi* public officers occupying a position of trust and acting in a fiduciary capacity. They represent the stockholders, and must not have private interests adverse to those of the stockholders. *Id.*

CORPORATION — continued.

3. CORPORATIONS ARE BOUND BY ACTS OF THEIR AGENTS OR DIRECTORS, IN CERTAIN CASES.— A contract made by the directors of a corporation in the course, and within the general scope of their powers and duties, is to be regarded as made by the corporation, although in making it the directors may have acted fraudulently. The rule is the same as that which prevails between private individuals. *Lewis* v. *Meier*, 286

4. RULE APPLIED.—Where a railway corporation, through its board of directors, entered into a contract for the construction of a part of its road with certain persons, some of whom were directors of the company, and, in pursuance of that contract, executed its bonds in a large sum secured by mortgage upon its property: *Held*, that although the contract be held void, yet the corporation, being itself a party to the fraud, could not maintain a bill to set aside and cancel the mortgage as a cloud upon its title. *Id.*

5. CORPORATIONS — WHEN DIRECTORS MAY TAKE SECURITY FROM.— The directors of a solvent corporation may lawfully pledge its securities to secure individual demands of directors and others, due and to accrue, for money loaned to it. *Id.*

6. CORPORATIONS — CONSOLIDATION OF SEVERAL — LIABILITY OF CONSOLIDATED COMPANY.— Where several corporations are united in one, and the property of the old companies vested in the new, the latter is liable in equity for the debts of the former, at least to the extent of the property received from them, and if it is also liable at law, the latter remedy is not exclusive. *Harrison* v. *Ark. Valley R'y Co.*, 264

7. CORPORATION — CONSOLIDATION — CITIZENSHIP.— Where two corporations existing in different states are in accordance with law consolidated into one by the sale of the franchises and property of one corporation to the other, the latter becomes the one consolidated company, and its citizenship is to be considered in determining the right of the consolidated company to sue in the federal court. *Held*, accordingly, that the Chicago, Burlington & Quincy Railroad Company, formed by consolidation of the Burlington & Missouri River Railroad Company in Nebraska with the former company, is an Illinois corporation. *Antelope Co.* v. *C., B. & Q. R. Co.*, 46

8. CORPORATION — BANK — CORPORATE EXISTENCE — LIABILITY OF STOCKHOLDERS AS PARTNERS.— The Bloomfield bank was organized and commenced business without paid-up capital, without a sworn statement of its paid-up capital to the state auditor, and without any certificate from the state auditor authorizing the association to commence business — all these things being required by statute. Code of Iowa, sec. 1576. *Held*, constru-

CORPORATION — continued.

ing said section with other provisions of the statutes of Iowa, that, notwithstanding these failures, there was an imperfect organization, and it was not the case of no corporation in which the incorporators would be liable to creditors as partners. *Stokes* v. *Findlay*, 205

9. SAME — SAME — SAME.— If a corporation proceeds to exercise its powers without the performance of the required conditions, it proceeds irregularly, and both the corporation and its individual members may be subjected to the penalties and liabilities prescribed by law; but it does not follow that the corporation, by reason of its delinquency in this regard, loses or forfeits *ipso facto* its corporate existence. *Id.*

10. INCORPORATION FOR PECUNIARY PROFIT — WHEN IT BECOMES A BODY CORPORATE.— Under the statutes of Iowa, a corporation for pecuniary profit becomes a body corporate as soon as the articles of incorporation are filed in the office of the recorder of deeds. *Id.*

11. RAILROAD CORPORATION — POWER TO LEASE — STATUTE CONSTRUED.— Under the statute of Nebraska, the lease of a line of railway, or arrangement to lease, executed by one railroad corporation to another, to be valid, must be assented to by a vote of at least two-thirds of the stockholders of each corporation, in stockholders' meeting assembled. *Peters et al.* v. *Lincoln & N. W. R. Co.*, 269

12. SAME — AGREEMENT TO LEASE MADE IN ADVANCE OF CONSTRUCTION TO SECURE STOCK SUBSCRIPTIONS.— No agreement to execute such a lease, made in advance of the construction of a railroad, can be specifically enforced unless it is subsequently ratified by a vote of the stockholders, as provided by the statute. *Id.*

13. CORPORATIONS — RIGHTS OF STOCKHOLDERS.— Persons subscribing to the stock of a corporation must take notice of the law creating it and defining its powers, and if the directors, in order to secure stock subscriptions, propose to do that which they are prohibited from doing by the statute, no subscriber can be heard to insist that the same shall be done contrary to such statute. *Id.*

14. CORPORATION — SALE OF STOCK BELOW PAR.— A corporation may dispose of its stock for less than its face value, and the transaction, as between the corporation and the purchaser, will be valid, unless prohibited by statute, and there is no such prohibition in Colorado. *Harrison* v. *Ark. Valley R'y Co.*, 264

15. STOCKHOLDERS — CONTRIBUTION — PRACTICE.— Where the plaintiff, in a suit against one corporation, was a stockholder in another, and in the latter capacity, with other stockholders,

CORPORATION — continued.

liable to contribute to the defendant in case the defendant pays the debt: *Held*, no decree for contribution could be rendered against the plaintiff alone in the present suit, for want of proper parties and appropriate pleadings, and that defendants may be decreed to pay the debt to plaintiff and then institute proceedings against plaintiff and other stockholders to enforce contribution. *Id.*

16. CORPORATION — STOCK — PLEDGED AS COLLATERAL — SALE OF.— When stock is pledged as collateral security by delivery of the certificates with blank transfer on the back, signed by the owner, and the principal indebtedness is past due, the pledgee can sell the stock as the readiest mode of collection, giving the pledgor and his successor in interest reasonable notice to redeem, and of the time and place of sale. *Canfield* v. *Minn. Agricultural & Mechanical Ass'n*, 646

17. SAME — ABSOLUTE OWNERSHIP — HOW ACQUIRED.— The pledgee, a bank, improperly purchased the pledge through an agent. *Held*, that nothing passed by such form of sale, and the bank still holds the pledge by its original title as collateral security, and only a *bona fide* purchaser from the bank could subsequently acquire absolute ownership of the stock. *Id.*

18. SAME — RECOVERY OF LAND REPRESENTED BY THE STOCK.— When the pledge is stock of an association, having no other corporate property than real estate, *held*, that the complainant, who had succeeded to all the rights of the original pledgor, could recover the land by a suit in equity, on reimbursing the grantees, who obtained their title with notice of his rights and equities, the amount they are actually out of pocket. *Id.*

19. SAME — ACCOUNTING OF RENTS, PROFITS AND INCOME.— To arrive at such sum an account must be had of rents, profits and income received by such grantees while in possession of the real estate. *Id.*

20. CORPORATIONS — FRAUDULENT TRANSFER OF ASSETS.— Equity will not permit the stockholders in one corporation to organize another and transfer all the corporate property of the former to the latter, without paying all the corporate debts. *Hibernia Ins. Co.* v. *St. L. & N. O. T. Co.*, 432

21. SAME — ENFORCEMENT OF OBLIGATIONS.— Where such a transfer is made, the obligations of the old corporation may be enorced against the new to the extent of the assets received by it. *Id.*

22. CORPORATIONS — AGENT — ACTS, WHEN BINDING.— Corporations are held to whatever is within the apparent scope of their agents' powers, unless parties with whom such agents contract have notice that their powers are limited. *Fletcher* v. *N. Y. Life Ins. Co.*, 440

CORPORATION — continued.

23. FOREIGN CORPORATIONS — NON-RESIDENTS — STATUTE OF LIMITATIONS.— A foreign corporation that by the laws of a state within which it comes on business can sue and be sued, is not a *non-resident* in the sense that would prevent it from setting up the statute of limitations as a defense in an action against it; and section 2533 of the code of Iowa, that provides that "the time during which a defendant is a non-resident of the state shall not be included in computing the period of limitation," has no reference to such a case. *McCabe* v. *Ill. Cent. R. Co.*, 492

24. SAME — PLEDGE — DELIVERY.— Where the directors of a corporation placed the company's policies of insurance in the hands of two of its directors without any formal assignment, to secure loans made and to be made by such directors and others to the corporation, *held*, that there was a sufficient delivery to sustain the pledge. *Stout* v. *Yaeger Milling Co.*, 486

25. SAME — FRAUDULENT PREFERENCE.— Where A., a bank which held stock in B., an insolvent corporation, and which was a representative in B.'s board of directors, took security from B. for money due it from B., and for advances to be made by it on B.'s account, and thereafter made large advances on the faith of the security received, *held*, that A. was bound to account to unsecured creditors for their *pro rata* of the proceeds of such securities. *Id.*

26. MANDAMUS TO COMPEL PAYMENT OF DEBT OF MUNICIPAL CORPORATION — RETURN.— The return to an alternative writ of *mandamus*, issued against a city to enforce the payment of a judgment, must show that the city has exhausted its power in the levy and collection of taxes under power conferred upon it by its charter and its amendments, and that the revenues so collected have been properly applied. *Beaulieu & Allen* v. *City of Pleasant Hill*, 554

27. MUNICIPAL CORPORATION — CREDITOR TAKING BOND — REMEDY.— A creditor taking a bond of a municipal corporation whose taxing power at the time of the issuing of the bond was and still is limited, and providing that the bond and interest shall be paid out of the yearly revenue of the city, cannot insist on remedies beyond the limitation, but may insist on the full and proper exercise of such power within the limitation. *Id.*

28. MUNICIPAL CORPORATION — INCREASING FLOW OF SURFACE WATER.— If a city constructs a sewer in such a manner that an *additional* flow of surface water into a lot is caused thereby, the owner of such lot may recover such damages as may have been caused by such *increased* flow. *Arn* v. *City of Kansas*, 558

CORPORATION — continued.

29. SAME — CONSTRUCTING SEWERS — INJURY TO PROPERTY. — A city, in the progress of constructing its sewerage, is not responsible for any depreciation in the rental value of property caused by the bad smells of a sewer in course of construction, unless it is kept open an unreasonable length of time. *Id.*

30. CORPORATION — JURISDICTION. — The "principal place of business" of a corporation is no test of residence, whether of a corporation or of a natural person, as a person may reside in one state and have his principal or sole place of business in another state. *Guinn* v. *Iowa Cent. R'y*, 566

31. FEDERAL CORPORATION — RIGHT TO SUE IN FEDERAL COURTS — JURISDICTION. — The fact that a suit is by, or against, a federal corporation, is not, of itself, sufficient to confer jurisdiction upon a federal court. A case arises under a law of the United States when some question is presented involving the construction of some provision thereof, or when some right or privilege is claimed thereunder. *Adams Ex. Co.* v. *D. & R. G. R'y Co.*, 77

CORRECTION — MISTAKE. See *Equity*, 10.

COSTS. See *Non-resident*, 1.

COUNTY COURTS. See *Debt*, 1, 2.

COUNTY INDEBTEDNESS. See *Debt*, 1.

COUPONS. See *Statute of Limitations*, 1.

COURTS. See *Debt*, 1, 2. *Judgment*, 2, 7, 10. *Probate Court*, 1.

COVENANT. See *City Ordinance*, 1. *Mortgage*, 1, 2.

CREDITORS. See *Trust*, 1. *Corporations*, 27. *Debtor and Creditor*, 1. *Fraud*, 4. *Insolvency*, 1.

1. ATTACHING AND JUDGMENT CREDITORS — THE LATTER CANNOT PRORATE WITH FORMER. — In this state attachment writs are not made returnable to terms of court. There is no such class of actions as mentioned in section 116 of the Code of Civil Procedure, and that section is inapplicable. The proceeds of attached property cannot be distributed as provided in that section. *Baum* v. *Gosline*, 317

CRIMES.

1. CRIMES — CONTEMPT — REV. ST. §§ 725, 1014. — A refusal to obey a subpœna issued by a federal court is an offense against the federal government, within the meaning of section 1014 of the Revised Statutes of the United States. *In re Ellerbe*, 449

2. SAME. — Where a federal court orders the arrest of a witness charged with having failed to obey a subpœna issued by it, and duly served, and the witness departs into another district before

CRIMES — continued.

he can be arrested, any judge of the United States, having jurisdiction in the district to which the witness has removed, may order his arrest and removal back to the district in which he is charged with the offense. *Id.*

3. SAME — RIGHT OF WITNESS TO A HEARING. — In such cases the judge ordering the arrest of the witness cannot inquire into his guilt or innocence before ordering his removal. *Id.*

CRIMINAL LAW.

1. CRIMINAL LAW — FRAUDULENT RETURNS OF POSTMASTER. — Any postmaster who shall make a false return to the auditor for the purpose of fraudulently increasing his compensation shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished under the provisions of chapter 259, vol. 20, Stats. at Large (2 Supp. Rev. St. 358). *U. S.* v. *Snyder*, 618

2. SAME — AIDERS AND ABETTORS — AS PRINCIPALS. — The statute above cited is not limited in its operation to the conviction and punishment of the postmaster guilty of the offense alone, but may be extended to all persons aiding, abetting and assisting in the commission of the crime, who are alike guilty of a misdemeanor under the statute, and may be indicted and convicted thereunder as principals. *Id.*

3. SAME — PUNISHMENT OF AIDERS AND PROCURERS. — All aiders, procurers or abettors in statutory offenses are punishable as principals, under the statute, although not expressly referred to in the statute, and that a defendant, though incompetent to commit the offense, as principal, by reason of not being of the particular age, particular sex, condition or class, may nevertheless be punished as procurer or abettor. *Id.*

4. INTENT OR MOTIVE — EVIDENCE OF OTHER SIMILAR ACTS. — Where the question is one of a fraudulent intent, it is allowable, as well in criminal as in civil cases, "to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish the intent or motive in the particular act directly in judgment." *Id.*

5. SAME — TRANSCRIPT OF AUDITOR OF DEPARTMENT. — It was *held* proper to admit in evidence the transcript of the report described in the indictment, duly certified by one of the auditors of the treasury for the postoffice department. *Id.*

CREDITORS' BILLS. See *Jurisdiction*, 1.

CROSS-BILL. See *Removal*, 17. *Foreclosure*, 1.

CROSSINGS — RAILROAD. See *Negligence*, 8, 9.

CUSTOM. See *Admiralty*, 2, 8.

DAMAGES. See *Libel*, 5. *Railroad*, 7, 11, 12. *Negligence*, 7, 10.

1. DAMAGES — PROVINCE OF JURY.— It is the province of the jury to find the amount due, as well as plaintiff's right to recover, and after the jury are discharged the court cannot increase the sum found. *Thompson & Co.* v. *Shea*, 93

DANGER — KNOWN. See *Negligence*, 16, 17.

DEBT. See *Compromise*, 1. *Bankruptcy*, 7. *Corporations*, 23.

1. COUNTY INDEBTEDNESS — POWERS VESTED IN COUNTY COURTS.— Where the legislature has intrusted the county courts and judges thereof with the settlement and compromise of the bonded indebtedness of their counties, they cannot divest themselves of these trusts and delegate them to another. *Coquard* v. *Chariton Co.*, 539

2. SAME — SAME — CANNOT BE DELEGATED.— A county court has no power to enter into a contract with a citizen of the state, delegating to such citizen the power and authority to compromise the outstanding indebtedness of such county, and give to such citizen the exclusive right to deal with the bondholders of the bonds of such county as its agent in effecting such compromise. *Id.*

DEBTOR AND CREDITOR. See *Trust*, 1. *Insolvency*, 1.

1. DEBTOR AND CREDITOR — ESTOPPEL.— Where an attaching creditor recovered judgment against an insolvent debtor, and the goods attached were sold by the marshal under an order of court, and bought by the judgment creditor pursuant to an agreement made by him before the sale with the judgment debtor, whereby it was understood that the creditor should purchase the goods at the lowest possible price and place them in the debtor's hands, to be sold by him as the creditor's agent, to the best advantage, and that after the payment of the creditor's claim and expenses the balance should be turned over to the debtor, and the goods were subsequently sold by the debtor as the purchaser's agent, and the proceeds remitted to the purchaser: *Held*, (1) That the agreement on the debtor's part constituted a sufficient consideration for the agreement on the part of his creditor. (2) That said creditor was liable to other creditors of said debtor for any sum remaining in his hands as proceeds of the sale of said goods by the debtor, over and above the sum of his own debt, together with his proper expenditures in connection with the management and sale of the said goods, and the sum paid to the marshal in satisfaction of his bid. (3) That said creditor was estopped to claim any sum to be due him, on account of the transaction embraced within the suit in which he had recovered said judgment, over and above the amount of the judgment. *Ries* v. *Rowland*. 85

DECEASED. See *Pleading*, 15.

DECREE. See *Practice*, 3.

1. DECREE OF ANOTHER COURT — WHEN AND HOW IMPEACHED.— Courts should judiciously refrain from interfering with the decrees of other courts, except when such interference or impeachment is plainly necessary. *Messchaert* v. *Kennedy*, 188

DEED. See *Equity*, 15. *Mortgage*, 2.

DEFAULT. See *Equity*, 5.

DEFENSE. See *Equity*, 1, 2, 3.

DELIVERY. See *Contracts*, 4, 8. *Corporation*, 24. *Mortgage*, 4.

DEPRIVATION — LIBERTY OR PROPERTY. See *Patent*, 4. *Removal*, 7.

DEPUTIES. See *Marshal*, 1.

DESCENT. See *Estate*, 1.

DILIGENCE. See *Negligence*, 12.

DIRECTORS. See *Corporations*, 1, 2, 3, 4, 5.

DISCLOSURE. See *Trustee*, 1.

DISCRETION OF COURT. See *Trial*, 1.

DISMISSAL PAPERS. See *Former Adjudication*, 2.

1. PLAINTIFF MAY DISMISS, BUT PAPERS REMAIN AND MAY BE USED AS EVIDENCE.— A complainant has an undoubted right to dismiss his suit, either in whole or in part. But the pleadings will remain a part of the record, and, if material and competent, may be relied upon by the adverse party as evidence in the case. *Lyster* v. *Stickney*, 109

DISCRIMINATION. See *Carriers*, 1, 2, 3.

DISTRIBUTION. See *Estate*, 1.

DUPLICITY. See *Indictment*, 3.

EJECTMENT.

1. EJECTMENT — PATENT.— In an action of ejectment, a patent for land granted by the United States cannot be collaterally attacked. *St. L. S. & R. Co.* v. *Green*, 232

EMINENT DOMAIN.

1. EMINENT DOMAIN — USE OF STREET IN A CITY FOR RAILROAD PURPOSES — RIGHTS OF OWNERS OF ABUTTING LOTS.— Under sec. 15, art. II, of the constitution of the state of Colorado, the owners of lots abutting on a street in a city are entitled to com-

EMINENT DOMAIN — continued.
pensation for the use of the street for railroad purposes. *Mollandin* v. *U. P. R'y Co.*, 290
2. SAME. — Whether the title to the street is in the owners of lots or in the city, the rule is the same. *Rigney* v. *City of Chicago*, 102 Illinois, 64, followed. *Id.*

EMPLOYEE. See *Negligence*, 14, 15, 16, 17.
1. EMPLOYEE — UNSKILFUL ACT — LIABILITY OF EMPLOYER. — The defendant company was bound to employ persons sufficiently skilled for the work for which they were employed; but having done so, is not liable for their careless or negligent acts. Neither is the employer liable for the neglect or carelessness of the employee unless such neglect or carelessness was habitual and was known, or by the use of reasonable diligence might have been known, to the employer, and was unknown to the plaintiff. *Melville* v. *M. R. F. S. & G. R. Co.*, 194
2. LABORERS who engage in joint work assume all ordinary risk growing out of the occupation and work in which they are engaged, including the acts of skilful co-laborers. *Id.*
3. DUTY OF EMPLOYER TO EMPLOYEES. — It was the duty of the defendant company to supply to the plaintiff suitable helpers, and the plaintiff had a right, in the absence of knowledge to the contrary, to presume that helpers employed were sufficiently skilled; but this obligation on the part of defendant is fully discharged if ordinary care was exercised by the foreman in the employment of helpers. *Id.*
4. NEGLIGENT ACT OF A SKILFUL WORKMAN. — If the helper was sufficiently skilled for the work in which he was engaged, and struck the blow which caused the injury negligently or carelessly, the defendant is not liable. The consequences of such acts are to be borne by those engaged in the common work. *Id.*

EMPLOYER. See *Employee*, 1, 3. *Negligence*, 14.

END LINES. See *Mining Claim*, 1.

ENFORCEMENT. See *Corporation*, 21.

EQUITABLE RELIEF. See *Practice*, 8.

EQUITABLE TITLE. See *Jurisdiction*, 3.

EQUITY. See *Fraud*, 1. *Indemnity*, 4. *Jurisdiction*, 3. *Practice*, 4, 5.
1. EQUITY — LAPSE OF TIME AS A DEFENSE. — It is a general principle of equity that lapse of time may constitute a sufficient defense, even in the absence of any statute of limitations, and without necessary reference to any question of laches. *United States* v. *Beebe*, 13

EQUITY — continued.

2. SAME — SAME. — When the lapse of time has been so great as to afford a reasonable presumption that the witnesses are dead and the proofs lost or destroyed, a court of equity will refuse to undertake the task of ascertaining the facts and affording a remedy, and this not because of any statutory limitation, or because of laches merely, but upon grounds of public policy and for the peace of society. *Id.*

3. THE UNITED STATES BOUND BY THESE RULES. — Lapse of time may be a sufficient defense to a suit instituted in the name of the United States. When the government becomes a party to a suit in its courts, it is bound by the same principles that govern individuals. When the United States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants. *Id.*

4. EQUITY — SUBROGATION. — Where one person advances to another money to discharge a valid pre-existing lien upon real estate, the person so advancing such money, if not a mere volunteer, will be subrogated to the rights of the holder of such lien. *Edwards* v. *Davenport*, 34

5. BILL IN EQUITY — DEFAULT — PROOF. — It is error to render judgment upon the unanswered allegations of a bill in equity, without proof, upon service by publication only, and without appearance. A failure to deny the allegations of the bill is not a sufficient admission of those allegations to authorize a decree in accordance therewith. *Gray* v. *Jones*, 515

6. SAME — PLEADING — TITLE. — Complainants must in their bill allege and prove their own title to the lands claimed; they cannot recover by showing that defendants have no title thereto. *Id.*

7. EQUITY — PRACTICE — SUPPLEMENTAL BILL. — Leave will not be granted after decree to file a supplemental bill for the purpose of setting up matters which might, by the use of due diligence, have been ascertained, and pleaded by way of amendment in the original suit. *Mosgrove* v. *Kountze*, 561

8. SAME — CHANGING PARTIES. — The fact that the complainant desires to drop out of the case some of the parties defendant to the original bill does not of itself give him the right to proceed by supplemental bill, especially when it appears that such change of parties is not essential. *Id.*

9. EQUITY — PARTIES — WHO MUST JOIN AS COMPLAINANTS. — One of several joint owners of a number of bonds cannot maintain a suit in equity to declare such bonds a lien upon property without making the other joint owners parties. *Messchaert* v. *Kennedy et al.*, 133

10. EQUITY — CORRECTING MISTAKE OF LAW. — A mistake of law, made through the representations of an agent, may be corrected in equity. *Bailey* v. *Am. Cent. Ins. Co.*, 22

EQUITY — continued.

11. SAME — MISTAKE IN INSURANCE POLICY. — If an applicant for insurance correctly states his interest, and distinctly asks for an insurance thereon, and the agent of the insurer agrees to comply with his request, and assumes to decide on the form of the policy, and by mistake of law adopts the wrong form, a court of equity will reform the instrument so as to make it insurance upon the interest named. *Id.*
12. EQUITY — FRAUDULENT CONTRACT — NO RELIEF TO EITHER PARTY TO THE FRAUD. — The general rule is, that a court of equity will not interfere in behalf of either party to a contract fraudulent as to both parties, either to enforce or set aside the same, or award damages for a breach thereof. *Lewis* v. *Meier*, 286
13. SAME — SAME — CORPORATIONS ARE BOUND BY THE SAME RULE. — A corporation may be guilty of fraud, and if through its board of directors it enters into a fraudulent contract, it is subject to the rule above stated. *Id.*
14. THE REMEDY IN EQUITY. — Unlawful and unjust discrimination between railroad companies engaged in the carrying business may be enjoined in equity, in a suit by the party aggrieved against the party practicing such discrimination. *D. & R. G.* v. *A., T. & S. F.*, 325
15. EQUITY — TITLE NOT ACQUIRED UNDER FORGED DEEDS. — Purchasers from the grantees in deeds that have been forged acquire no title to the lands conveyed that a court of equity can protect. *Gray* v. *Jones*, 515

ERROR. See *Exception*, 1.

ESTATE.

1. ESTATES OF DECEASED — DESCENT AND DISTRIBUTION. — Where a second wife recovered judgment against a railroad company for the death of her husband by its negligence, and invested the proceeds thereof for the benefit of her children, and subsequently died, her heirs hold the estate in trust for themselves and the heirs of their father by a prior marriage, and the property or the proceeds thereof should be divided equally among the two sets of heirs. *Thomas* v. *Armstrong*, 176
2. SAME — RIGHTS OF HEIRS BY FIRST MARRIAGE. — Where heirs of a first marriage were in some way induced to believe that they were not entitled to any part of their money coming from their deceased father's estate until the youngest came of age, their delay until that time to assert their claims is not such laches as will deprive them of their rights. *Id.*

ESTOPPEL. See *Debtor and Creditor*, 1. *Pleading*, 1. *Bankruptcy*, 9.

1. ESTOPPEL. — *Query:* Does the doctrine of estoppel apply to one who is not the owner of real estate, but only taking steps to so

ESTOPPEL — continued.

become; as, applying for patent? *Smelting & Refining Co.* v. *Green*, 232

2. SAME.— An owner of real estate who stands by and allows improvements to be made thereon, while he may not be permitted to claim the improvements, will not thereby be estopped to assert title to the fee. *Id.*
3. SAME — NOTICE.— One making application for patent to mineral land is required by law to put on the premises notice thereof. The courts will presume such notice given; which notice is of itself a warning to all that the parties are about applying for a patent — seeking to obtain title. If one party knows the facts, or has opportunity to know them, and chooses to take his chances, the other party is not estopped. *Id.*
4. SAME — PROMISE.— A promise to convey title when obtained will not estop the promisor to assert such title by action in ejectment. *Id.*

EVIDENCE. See *Identity*, 2. *Criminal Law*, 4. *Insurance*, 5.

1. EVIDENCE — SHERIFF'S RETURN.— Where A. brings suit against B. by attachment, and the sheriff executing the writ seizes property belonging to C., the sheriff's return is conclusive as to the fact of seizure and the articles seized, in a suit by C. against A. for damages. *Stinson* v. *Hawkins*, 500
2. EVIDENCE — BURDEN OF PROOF.— Where, in a suit for rent, the defendant admits the fact of the tenancy at the rate stated in the petition, the burden of proof is upon him to show that the rent has been paid. *Gay* v. *Joplin*, 459.
3. EVIDENCE — PAROL MERGED IN WRITING — COLLATERAL MATTER OR CONDITION.— When parties, without any *fraud* or *mistake*, have deliberately put their engagements in writing, the law declares the writing to be not only the *best* but the *only evidence* of the agreement; but this does not prevent parties to a written agreement from proving that either contemporaneously or as a preliminary measure they had entered into a distinct oral agreement on some collateral matter, or an oral agreement which constitutes a condition on which the performance of a written agreement is to depend. *Michels* v. *Olmstead*, 549
4. EVIDENCE — FAILURE OF A PARTY, WHEN CALLED AS A WITNESS, TO ANSWER QUESTIONS.— The failure of a party to a suit to answer certain questions put to him upon cross-examination before an examiner does not authorize the rejection of his entire testimony on the trial. It was the duty of counsel to move the court for an order requiring him to answer, or in case of his refusal to do so without good cause, to strike out his testimony. *Myers* v. *Hazzard*, 94

EXCEPTION.

1. EXCEPTION — ERROR.— Exception having been taken, on previous trial of this case, to the statement by the district attorney, in his argument before the jury, to the effect that the failure of the defendant to testify in his own behalf should raise presumption against him, *held*, that it appearing on the records of such previous trial that the judge in his charge had corrected the remark, and stated to the jury that such language by the district attorney was wrong, cured whatever error there was in such statement. *United States* v. *Snyder*, 618

EXEMPLARY DAMAGES. See *Railroad*, 7.

EXEMPTION. See *Bankruptcy*, 5, 6.

EXHIBITS. See *Pleading*, 14.

EXISTENCE. See *Corporation*, 8, 9.

EXPATRIATION. See *Citizenship*, 2.

FAILURE TO RESCIND. See *Contract*.

FALSE CLAIMS AGAINST UNITED STATES. See *Indictment*, 1.

FEDERAL CORPORATION. See *Corporation*, 4.

FEDERAL COURTS. See *Habeas Corpus*, 1, 2. *Corporation*, 18. *Statutes*, 2, 3, 7. *Non-resident*, 2. *Right of Way*, 1.

FEDERAL STATUTES. See *Statutes*, 2.

FELLOW SERVANT. See *Negligence*, 14.

FIDUCIARY. See *Trust*, 2.

FINDINGS. See *Verdict*, 1.

FORECLOSURE. See *Removal*, 17.

1. FORECLOSURE — SALE OF RAILROAD — FRAUD.— The allegations of fraud in a decree of foreclosure, and in the sale thereunder of a railroad, and the proofs thereon considered, and the transactions held not fraudulent. *Messchaert* v. *Kennedy*, 133

FOREIGN CORPORATION. See *Corporation*, 23.

FOREIGN JURISDICTION. See *Pleading*, 5.

FORGED DEEDS. See *Equity*, 15.

FORMER ADJUDICATION. See *Pleading*, 1, 2.

1. FORMER ADJUDICATION — HOW FAR CONCLUSIVE.— Where the former suit was based upon the same facts as the later one, and was between the same parties or their privies, but to enforce a different demand and obtain another form of relief, the par-

FORMER ADJUDICATION — continued.
ties are conclusively bound, not by all that might have been litigated in the former suit, but by what was in fact litigated and decided therein. *Clark* v. *Blair*, 311
2. SAME — DECREE OF DISMISSAL. — Where, in the former suit, there was a decree dismissing the bill, it will be presumed, in the absence of proof, that the bill was dismissed because the court held upon some ground that the complainant had failed to make out a case for relief. *Id.*
3. SAME — EVIDENCE ALIUNDE. — In such a case it is competent to prove, by evidence *aliunde* the record, what questions were in fact contested and decided, if, under the pleadings, several questions might have been litigated and the case might have turned upon any one of them. *Id.*
4. SAME — SAME — RULE IN ABSENCE OF PROOF. — In the absence of such evidence the court will consider the former adjudication as conclusive upon the parties only as to questions which are common to both suits, and which were necessarily tried and determined in the former. *Id.*
5. SAME — SAME — EFFECT OF PROOF. — If the evidence in a second suit between the same parties is sufficient to entitle plaintiff to recover, his right cannot be defeated by showing a judgment against him in any action where the evidence in the second suit could not, if offered, have altered the result. *Id.*

FORMER ACTION. See *Pleading*, 6.

FRAUD. See *Bankruptcy*, 1, 2, 3, 4. *Judgment*, 2. *Foreclosure*, 1. *Rescission*, 1. *Equity*, 12, 13. *Insurance*, 9, 10, 11, 12. *Corporation*, 20, 22. *Criminal Law*, 1.
1. FRAUD — TRUST — EQUITY — WHEN RELIEF WILL BE DENIED. — It is a controlling maxim that a court of equity will not aid parties in the perpetration or consummation of a fraud; nor give any assistance whereby either of the parties connected with a betrayal of a trust can derive any advantage therefrom. *Farley* v. *St. P., M. & M. R'y*, 138
2. SAME — SAME — RECEIVER — PURCHASE BY, OF CLAIMS AGAINST THE PROPERTY IN HIS HANDS. — Where several parties, one of whom was the receiver of a railroad against which foreclosure proceedings were pending, entered into a scheme to purchase outstanding bonds secured by the mortgage being foreclosed, with a view to using the same in buying in the railroad under the expected foreclosure sale; and the receiver was to, and did, give to the other parties information known only to him respecting such bonds, and did aid and assist in the negotiations leading to the purchase of the same; and where the fact that the receiver was interested, and of his connection with such pur-

FRAUD — continued.

chases, was suppressed, and the purchases were made in the name of the other parties, who afterwards bid in the railroad at the foreclosure sale, in their own name, and refused to account to the receiver, *held*, the case was not one which can be upheld, without a violation of the most positive and clearly defined rules governing such cases. *Id.*

3. SAME — DISTINCTION BETWEEN ACTS MALA PROHIBITA AND MALA IN SE.— It may be that there is discernible in adjudged cases a distinction between acts *mala prohibita* and *mala in se*, through which funds or property have come into the hands of one confederate for the benefit of all — acts which have no intrinsic turpitude further than is implied in the violation of a mere statutory provision. *Brooks* v. *Martin*, 2 Wall. 70, considered. *Id.*

4. FRAUD — CONVEYANCES TO HINDER AND DELAY CREDITORS.— A mortgage executed to hinder and delay the mortgagor's creditors is void as to such creditors, even when for full value, if the mortgagee is aware of the fraudulent intent. *Stinson* v. *Hawkins*, 500

5. FRAUD NOT PRESUMED. — Where a defense of fraud and deceit is set up the law will presume that the plaintiff acted honestly and in good faith until defendant has clearly proven the contrary. *Michels* v. *Olmstead*, 549

FRAUDULENT CONTRACT. See *Equity*, 12, 13.

FRAUDULENT PREFERENCE. See *Corporation*, 25.

FRAUDULENT TRANSFER OF ASSETS. See *Corporation*, 20.

"FUTURES." See *Contract*, 5, 8, 9, 10.

HABEAS CORPUS.

1. HABEAS CORPUS — POWER OF FEDERAL COURTS — STATE CRIMINAL STATUTE.— The circuit court of the United States may issue the writ of *habeas corpus* upon the application of any person who is imprisoned in violation of the constitution, or of any law or treaty of the United States, and if a person be imprisoned under a state statute which is in conflict with either, that court has power to discharge. *In re John Brosnahan, Jr.*, 1

2. HABEAS CORPUS — JURISDICTION.— The federal courts have no jurisdiction to discharge a prisoner held under a state statute, upon the ground that such statute is in violation of the constitution of the state, or in excess of the powers which the people of the state have conferred on their legislature. If it does not violate the federal constitution, the question is for the state courts. *Id.*

HEIR. See *Will*, 2. *Estate*, 2.

HIGHWAY CROSSINGS. See *Negligence*, 8, 9.

HOMESTEAD. See *Bankruptcy*, 5, 6.

IDENTITY.

1. IDENTITY OF PERSON — PROVINCE OF JURY.— Where a witness was called who represented himself to be the husband of the plaintiff, while the plaintiff denied that he was her husband, and the witness was ignorant of many circumstances in the life of the person whom he personated, and the testimony adduced in support of his identity was conflicting, it is the peculiar province of the jury to decide the question of identity from all the evidence adduced. *Wackerle* v. *Mut. Life Ins. Co.*, 508
2. SAME — WEIGHT OF EVIDENCE.— Where there is a vast conflict of testimony, in which there is a question of identity to be established, it is for the jury first to consider which witnesses had the best opportunity and were most likely to know the facts, and second, to give to those witnesses whose long acquaintance and special opportunities were such as to enable them to carry in their recollection the identity of the particular party, greater weight than those who only casually knew the party. *Id.*
3. SAME — CONCLUSIVENESS OF VERDICT.— Where the court alluded to and commented on the evidence sharply against plaintiff's claim so far as identity depended on the exhumed skeleton of the party alleged to have been her husband, and the jury reached the conclusion that it was the skeleton of her husband, killed in a railroad accident as alleged, and that the witness representing himself to be her husband was not what he pretended, which was their exclusive province, the court will not interfere with the verdict. *Id.*

IMPEACHMENT. See *Decree*, 1.

INCOME. See *Corporation*, 19.

INDEMNITY.

1. BOND OF INDEMNITY — PARTIES — JOINDER OF TO RECOVER THE PENALTY.— A party cannot sue alone on a bond of indemnity made to himself and other obligees on a prior delivery bond without showing that he alone has received injury by the breach thereof, and therefore that he brings the suit without joining the other obligees as plaintiffs. He cannot set out a bond as running to or as made to himself alone, and give in evidence an instrument made to himself jointly with other obligees. *Percival* v. *McCoy*, 418
2. SAME — MISRECITAL IN PLEADING — VARIANCE.— In an action upon an indemnity bond, given to indemnify the sureties on a prior delivery bond, a misrecital of the amount of the penalty in the delivery bond, of the parties in it to be indemnified, and

INDEMNITY — continued.

of the terms and conditions of the delivery to be made under it, is a fatal variance. *Id.*

3. SAME — VARIANCE NOT CURED BY AVERMENT OF MISTAKE.— Such variance cannot be cured by an averment that the indemnity bond sued on was executed by mistake and inadvertence, without alleging and proving that the mistake was mutual, and that it was the intention of the parties to the indemnity bond to indemnify the sureties on the prior delivery bond. *Id.*

4. SAME — LIABILITY OF SURETIES — REMEDY IN EQUITY.— The liability of sureties cannot be enlarged or changed by averment in the pleading, whatever the understanding of the pleader may have been; and where an indemnity bond has been executed by mistake or inadvertence, the proper remedy is by a bill in equity to reform it and make it conform to the mutual intention of the parties. *Id.*

INDIAN COUNTRY.

1. INDIAN COUNTRY.— A particular portion of the public domain upon which an Indian tribe has been suffered long to remain, while other portions have been opened to settlement, or set apart particularly for Indian occupation, does not constitute such tract an Indian reservation. *Forty-three Cases Cognac Brandy,* 616

2. SAME.— The fact that a tract of country has sometimes been referred to in treaties and official reports as the Red Lake Reservation, is not sufficient to authorize the court, in a *quasi* criminal case, to declare it to be such. *Id.*

INDICTMENT.

1. INDICTMENT — FALSE CLAIMS AGAINST THE UNITED STATES.— Any person who makes, or causes to be made, or presents, or causes to be presented, any false claim against the United States, knowing the same to be false, or who, for the purpose of aiding another to obtain the payment of a false claim, by making or using, or causing to be made or used, any false bill, account, claim, certificate, affidavit or deposition, knowing the same to be false, may be punished under the provisions of section 5438 of the Revised Statutes of the United States. *United States* v. *Hull,* 272

2. SAME — SAME — STATUTE CONSTRUED.— The section above named is not limited in its operation to false claims presented by the accused on his own behalf, but applies as well to such claims presented by agents, attorneys and others, or, in other words, to every person presenting or aiding in the collection of a false claim, knowing it to be false. *Id.*

INDICTMENT — continued.

3. INDICTMENT — DUPLICITY. — An indictment which charges that the defendant did, and caused to be done, a particular act, is not bad for duplicity. *Id.*

INFRINGEMENT. See *Patent*, 6.

INJUNCTION. See *Practice*, 4. *Postoffice*, 1.

1. INJUNCTION against the negotiation of notes, etc., alleged by a sufficient bill to have been executed under duress, will not be dissolved upon the face of the papers. *Lyster* v. *Stickney*, 109

2. INJUNCTION — WHEN GRANTED BEFORE FINAL HEARING. — A preliminary injunction may be granted to preserve existing relations, but will not be granted to compel a defendant to adopt a new course of dealing with the plaintiff. *D. & R. G.* v. *A., T. & S. F.*, 825

INJURY. See *Negligence*, 3, 8, 9. *Corporation*, 26.

INNOCENT THIRD PARTIES. See *Mortgage*, 4.

INSOLVENCY.

1. INSOLVENT DEBTOR — PREFERENCE TO CREDITORS. — The creditors of a contractor in failing circumstances agreed together to buy his land, and to be interested therein in proportion to their several claims, and a deed therefor was made by the debtor and his wife to two of the creditors for the parties interested in the purchase; the purchase money to be made up of various items of indebtedness of the debtor to the parties interested in the purchase, who had, on their part, to remove the liens of two judgments, which judgments were not paid off, but were assigned to the parties to be held for contingencies. Subsequently an attachment was sued out against the land. *Held*, that the deed from the debtor and wife be set aside, and the deed of sale of the land to one of the defendants, under an assignment of the trust deed of the wife made to her for a debt due her by the husband, be set aside; and that the land attached be sold, and the fund applied, first, to the payment of taxes; next, to the amounts of the judgments, with interest; next, the amount for which the deed of trust was assigned, with interest; and next, the complainants the amount of their judgment, with interest — the difference between the amounts of the wife's trust deed and the amount for which she assigned it to be reserved for further consideration. *Bean* v. *Patterson*, 179

2. STATE INSOLVENCY LAWS — CONSTITUTIONALITY. — In the absence of congressional action enacting a bankrupt law, states may pass insolvent laws; but such laws have no extraterritorial op-

INSOLVENCY — continued.

eration, and do not apply to contracts made within the state between its citizens and citizens of other states. Such laws do not necessarily impair the obligation of contracts within the inhibition of the constitution of the United States. *Mather* v. *Nesbit*, 505

3. SAME.— The provision of an insolvent law which does not grant a discharge of the debtor on surrender of all his property to an assignee or a receiver, but merely gives a priority to creditors who will release the debtor over those who stand back and do not accept the conditions under which his property passes to the assignee or the receiver, and who alone can receive dividends from the estate, is not in conflict with the constitution of the state or of the United States. *Id.*

4. SAME — ATTACHMENT — DISSOLUTION OF.— Section 915 of the Revised Statutes adopts the remedy by attachment provided by state laws; and when a contingency arises whereby the attachment would be dissolved under provisions of a state law, the attachment will be deemed dissolved in a federal court, as provided in section 933 of the Revised Statutes. *Id.*

INSTRUMENT. See *Negotiable Paper.*

INSURANCE. See *Equity*, 11.

1. INSURANCE — CONSTRUCTION OF POLICY. — A policy of insurance, being a contract drawn by the insurance company embodying its own terms and conditions, will be construed strictly in favor of the assured; and if the language employed leaves a question of interpretation in doubt, that construction adopted and acted upon by him will be upheld. *Wallace* v. *German Am. Ins. Co.*, 123

2. SAME — SAME — ARBITRATION.— Where a policy of insurance provided that, in case of differences arising as to any loss or damage, the matter shall, at the written request of either party, be submitted to arbitration, and that no suit to recover damages shall be maintainable until after an award shall have been obtained fixing the damages in the manner above provided, *held*, that the assured had reasonable ground for supposing that, if neither party demanded an arbitration, the ordinary remedy by suit remained; and the assured having acted upon that construction, the court should adopt it. *Id.*

3. INSURANCE — APPLICANT MUST ACT IN GOOD FAITH.— A party applying for insurance is bound to answer questions concerning facts material to the risk, truthfully. *Lueder's Ex'rs* v. *Hartford L. & A. Ins. Co.*, 149

4. SAME — APPLICATION — RULE WHEN AGENT INSERTS FALSE STATEMENTS.— Where an authorized agent of an insurance company

INSURANCE — continued.

has examined an applicant for insurance upon questions contained in a blank application, and undertakes to fill in the applicant's answer, the applicant has a right to presume that his answers have been written down as given; and if he has answered all questions truly, and signs the application under the impression that his answers have been correctly reduced to writing, a policy issued on the faith of the application will not be invalidated by false answers inserted in the application by the company's agent without the applicant's knowledge, even where the application is made a part of the policy and contains a declaration that the answers contained therein "are full, complete, and true; and it is agreed that this declaration and warranty shall form the basis of the contract between the undersigned" and the company. *Id.*

5. SAME — EVIDENCE.— In such cases oral evidence is admissible to prove that the questions contained in the application were answered truly by the applicant. *Id.*

6. SAME — JUDGMENTS.— Where a mutual life insurance company issued five certificates of membership in its safety-fund department to an applicant for insurance, in each of which it agreed in case of the assured's death to make an assessment "upon the holders of certificates in force in said department at the date of such death according to the table of graduated assessment rates given herein, as determined by their respective ages and the number of such certificates in force at the date of such death, and the sum collected thereon (less ten cents per member for costs of collection) shall be paid; provided, however, that in no case shall the payment upon this certificate, in the event of such death, exceed $1,000, less $15 as a *post mortem* contribution to said safety fund:" *held*, that upon the assured's death his legal representative was entitled to judgment against said company for the maximum amount named in said certificate. *Id.*

7. INSURANCE — INTEREST INSURED — MAY BE ENHANCED.— A change of title which increases the interest of the insured, whether the same be by sale under judicial decree or by voluntary conveyance, does not defeat the insurance, as where the interest insured was that of a mortgagee, who afterwards obtains the full title. *Bailey* v. *Am. Cent. Ins. Co.*, 221

8. INSURANCE — CORPORATIONS — COMITY.—A foreign insurance company cannot withdraw itself from the operation of the statutes of a state in which it does business, by the insertion of clauses in its policies. *Fletcher* v. *N. Y. Life Ins. Co.*, 440

9. SAME — APPLICATION FOR INSURANCE — FRAUD.— Where, by the terms of a policy of insurance sued on, an application signed by the assured is declared to be the sole basis thereof, evidence is

INSURANCE — continued.

admissible to show that false statements contained in the application were inserted without the applicant's knowledge by an agent of defendant, and that the applicant's signature was procured by such agent by fraud. *Id.*

10. INSURANCE — APPLICATION — FRAUD. — Where a party desiring insurance upon his life signed an application which contained an agreement that the statements and representations therein should be the basis of the contract, and warranted their truthfulness; and which also contained an agreement that no statements, representations or information made or given by or to the person soliciting or taking his application for a policy, or to any other person, should be binding on the company, or in any manner affect its rights, unless such statements, representations or information were reduced to writing and presented to the officers of the company at its home office; and where such application contained two false answers material to the risk, which had been written therein by the agent of the company who examined the applicant and took his application; *held*, that no suit could be maintained on the policy in case of the assured's death unless it were proved that the assured's answers to the questions to which false answers had been inserted were true, that the false answers had been inserted by the company's agent without the assured's knowledge, and that such agent concealed from the assured what he had written in the application, and induced him to sign it without knowing what it contained. *Id.*

11. SAME. — Parol evidence is admissible in such cases to show fraud on the agent's part. *Id.*

12. SAME — CONCEALMENT OF AGENT'S FRAUD. — Where an applicant for insurance discovers, before the policy is issued or the first premium paid, that the company's agent has obtained his signature to an application containing false answers, it is his duty to go no further in the transaction; but if he does not make the discovery until after the policy has been issued and the first premium paid, he is not bound to take any steps to have the policy canceled. *Id.*

13. LIFE INSURANCE — BURDEN OF PROOF. — In an action by a wife on the policy of insurance taken out on her husband's life, the burden of proof is on the plaintiff to prove the death of her husband and her right to recover. *Wackerle* v. *Mut. Life Ins. Co.*, 508

ISSUE. See *Pleading*, 16, 17.

INTENT. See *Criminal Law*, 4.

INTERLOCUTORY DECREE. See *Practice*, 8.

JOINDER. See *Indemnity*, 1. *Pleading*, 7, 8, 9, 10, 11.

JOINT ACTION. See *Pleading*, 7.

JOINT CONTRACT. See *Contract*, 7.

JUDGMENT. See *Insurance*, 6. *Pleading*, 1, 2. *Service*, 1.

1. JUDGMENT — POWER OF COURT AFTER THE TERM. — No court can reverse or annul its own final decrees or judgments for errors of fact or law, after the term at which they have been rendered, unless for clerical mistakes. An order finally dismissing or discontinuing a cause, in pursuance of the agreement of compromise and settlement between the parties, is in the nature of a final order disposing of the case. *Grames* v. *Hawley*, 61
2. SAME — SAME — FRAUD. — A judgment can no more be set aside upon motion after the term upon the ground of fraud than upon any other ground. A hearing upon proper notice upon that question is the right of the party charged with the fraud. *Id.*
3. SAME — JURISDICTION. — At the end of the term at which there is a final disposition of the case, the parties are dismissed *sine die*, and may then discharge their attorneys with the assurance that the controversy is at an end, and can be renewed only by proceedings in the nature of error or appeal. *Id.*
4. JUDGMENT — MERGER. — Where suit is brought and judgment recovered upon a claim, it is merged in the judgment, and the latter is conclusive as to the amount due. *Ries* v. *Rowland*, 85
5. SATISFACTION OF JUDGMENT — PRESUMED FROM LAPSE OF TIME. — Satisfaction of a judgment may be presumed from lapse of time in a shorter period than twenty years, if circumstances are shown which render satisfaction probable. *Renwick* v. *Wheeler*, 119
6. FINAL JUDGMENT. — A judgment for defendants, for want of replication to answer, is a final judgment. *Newman* v. *Newman*, 293
7. JUDGMENT — POWER OF COURT OVER, AFTER TERM. — Suit was brought in Colorado on a judgment rendered by the superior court of Cook county, Illinois, and judgment was rendered here. Subsequently the Illinois judgment, the case being removed by writ of error to the appellate court of that state, was reversed. Defendant sets up these facts in a petition, and moves that the judgment be vacated. *Held*, that such proceeding is allowable. *Heckling* v. *Allen*, 303
8. SAME — CIRCUMSTANCES ARISING AFTER JUDGMENT. — While it is the general rule that, as to all matters that were in issue, or which might have been contested at the time judgment was rendered, the court has no power to vacate judgment after the expiration of the term at which it was rendered, yet

JUDGMENT — continued.

as to matters arising after the judgment, or before the judgment but too late to be presented as a defense, the rule is different. Relief in such case may be had by motion to vacate or otherwise, as the circumstances may require. *Id.*

9. THE ISSUE GROWING OUT OF THE SUBSEQUENT FACTS MUST BE TRIED. — In this case the judgment of the superior court having been reversed and the case remanded for retrial there, proceedings in this court will be stayed until final action by the courts of Illinois, when proper steps can be taken to afford relief, either by a renewal of this motion, or by proceeding in equity, or otherwise, as the circumstances may require. *Id.*

10. COURT CANNOT VACATE JUDGMENT AFTER TERM. — After the term has closed, the court has no power, without the consent of parties, to vacate a judgment. A stipulation consenting to vacate within a certain time is wholly inoperative after the time specified has elapsed. *Newman* v. *Newman*, 293

JUDGMENT CREDITORS. See *Creditors*, 1.

JUNIOR LIENHOLDER. See *Redemption*, 1.

JURISDICTION. See *Habeas Corpus*, 2. *Judgment*, 3. *Right of Way*, 1. *Practice*, 1, 8. *Pleading*, 5. *Removal*, 12, 15. *Corporation*, 30, 31.

1. JURISDICTION — CREDITOR'S BILL — LEVY. — In the federal courts a bill will not lie by a general creditor, who has no lien by levy or otherwise upon mortgaged property, to set aside the mortgage on the ground of fraud. *Maish* v. *Bird*, 129

2. JURISDICTION — CITIZENSHIP. — The fact that one of several complainants in a suit to foreclose a mortgage is a citizen of the same state with the defendants, does not present a question of jurisdiction going to the whole case. The court may dismiss the bill as to such complainant and retain it as to others unless he is a necessary party *National Bank* v. *Gas Light & Coke Co.*, 319

3. JURISDICTION — HOLDER OF EQUITABLE TITLE. — Where complainants, holding the equitable title, bring their bill to compel a conveyance of the legal title by those who hold it in trust for them, the jurisdiction of a court of equity in nowise depends upon possession by complainants of the land. *Gray* v. *Jones*, 515

JURY, PROVINCE OF. See *Railroad*, 8. *Identity*, 1. *Damages*, 1. *Libel*, 4, 5.

LABOR. See *Employee*, 1, 2, 3, 4.

LABORERS. See *Employee*, 2.

LACHES. See *Contract*, 12.

LAND. See *Statute of Limitations*, 2. *Contract*, 12. *Corporation*, 18.

1. PUBLIC LAND — JURISDICTION OF LAND OFFICERS OF THE UNITED STATES.— The courts will not, by reason of their jurisdiction of the parties to a cause, determine their respective rights to enter or purchase from the United States a tract of the public land, when the controversy between them remains pending before the land department of the government, nor will they pass a decree that will render void a patent when issued. *Casey* v. *Vassor*, 127

2. SAME — SAME — OFFICERS OF THE GOVERNMENT.— The courts will not interfere with the officers of the government while engaged in the discharge of their duties in disposing of the public lands. *Id.*

3 PATENT FOR LAND — ASSIGNOR AS TRUSTEE.— A certificate of entry or location under a military land warrant vests in the holder an equitable title to the land, and gives him a right to the patent when issued; and if he conveys the land, or assigns the certificate, and afterwards obtains the patent, he becomes, under the statute (Rev. St. § 2414), as well as upon the plainest principles of equity, a trustee for the person to whom he had previously sold or assigned. *Gray* v. *Jones*, 515

LANDLORD.

1. LANDLORD AND TENANT.— In the absence of any agreement, a tenant is not entitled to compensation for improvements voluntarily placed by him upon the leasehold. *Gay* v. *Joplin*, 459

LAPSE OF TIME. See *Equity*, 1, 2, 3. *Judgment*, 5.

LEASE. See *Corporation*, 11, 12. *Postoffice*, 3. *Negligence*, 11.

LEVY. See *Jurisdiction*, 1.

LEX REI SITÆ. See *Will*, 1.

LIABILITY. See *Corporation*, 6, 7, 8, 9. *Railroad*, 6. *Indemnity*, 4. *Employee*, 1. *Negligence*, 14.

LIBEL. See *Privileged Communications*, 1, 2.

1. LIBEL — PRIVILEGED COMMUNICATIONS. — A communication is privileged when made in good faith in answer to one having an interest in the information sought, and it will be privileged if volunteered, when the party to whom it is made has an interest in it, and the party making it stands in such relation to him as to make it a reasonable duty, or at least proper, that he should give the information. *Erber & Stickler* v. *Dun & Co.*, 160

2. LIBEL — ON MERCHANTS OR BUSINESS MEN.— Every publication, in writing or in print, which charges upon or imputes to a mer-

LIBEL — continued.

chant or business man insolvency or bankruptcy, or conduct which would prejudice him in his business or trade, or be injurious to his standing or credit as a merchant or business man, is a libel. *Id.*

3. SAME — "DAILY NOTIFICATION SHEETS" — RESPONSIBILITY. — Where defendants, in the course of their business, issued "daily notification sheets," and sent them to all their subscribers, irrespective of their interest in the question of the plaintiffs' credit and standing, and this sheet was distributed to persons having no interest in being informed of the condition of plaintiffs' firm, this fact robs it of the protection of a privileged communication, and if it contains a libel on the plaintiffs, defendants cannot escape responsibility for such libel on the plea that it was a privileged communication to their subscribers. *Id.*

4. SAME — PROVINCE OF JURY. — Where such "daily notification sheet" contained the names of the plaintiffs, and opposite thereto the words "Call at office," it rests with the jury, in view of the definition of a libel, and considering all the evidence adduced and relating to these words, to determine whether they constitute a libel on the plaintiffs in their business as merchants. *Id.*

5. SAME — MEASURE OF DAMAGES — PROVINCE OF JURY. — Where a publication is libelous, the law presumes that it was made with malice — technical, legal malice, but not malice in fact, — and the amount of damages depends in a large degree upon the motives which actuated defendants in its publication; and in such cases the law leaves it to the jury to find and return such damages as they think right and just, by a sound, temperate, deliberate and reasonable exercise of their functions as jurymen. *Id.*

LIBERTY. See *Patent*, 4.

LICENSE. See *Trespass.*

LIEN. See *Redemption*, 1.

1. LIEN — GARNISHMENT. — It is well settled that no lien upon specific property is secured by the service of the process of garnishment upon the party in possession thereof. *Maish* v. *Bird*, 120

2. ATTORNEY HAS NO LIEN UNLESS GIVEN BY STATUTE. — An attorney has no lien for fee unless conferred by statute, and a party to a suit has an undoubted right to settle his suit without the consent of his attorney. *Swanston* v. *Morn. Star Mining Co.*, 241

LIENHOLDER. See *Redemption*, 1.

LIFE INSURANCE. See *Insurance.*

LIMITATION. See *Bankruptcy*, 1, 2, 3. *Corporation*, 23. *Carriers*, 5.

LIS PENDENS. See *Negotiable Paper*, 8.

LOCAL USAGE — CUSTOM. See *Admiralty*, 2, 3.

MALA PROHIBITA AND MALA IN SE. See *Fraud*, 3.

MANDAMUS. See *Corporation*, 26.

MARRIED WOMAN. See *Citizenship*, 1. *Mortgage*, 2.

MARSHAL.

1. MARSHAL — SPECIAL DEPUTIES — OFFICERS DE FACTO. — Where, under the laws of the state, a sheriff may appoint a person to perform a special service, a marshal, under section 788 of the Revised Statutes, has the same authority, and the person so appointed by him is an officer *de facto*, and a person served with process by such appointee cannot dispute his authority on the ground that he had not taken the oath of office, as required by the statute in relation to the appointment of deputies. *Hyman v. Chales and others*, 248

MASTER AND SERVANT. See *Negligence*, 5.

MATERIALITY. See *Pleading*, 16, 17.

MEASURE OF DAMAGES. See *Railroad*, 11. *Libel*, 5. *Negligence*, 5, 7.

MENTAL CAPACITY. See *Contract*, 2, 3.

MERCANTILE AGENCY. See *Privileged Communications*, 1, 2. *Libel*, 1, 2, 3, 4, 5.

MERGER. See *Judgment*, 4.

MINING CLAIMS.

1. MINING CLAIMS — END LINES. — In the location of mining claims, "end lines" must be established as required by the statute, and where the locator fails to do this, the courts will not fix them by implication. If the end lines be absent, or so placed as not to define the right of the locator to the exterior parts of the lode, the defect cannot be supplied. *Elgin Mining & Smelting Co. v. Iron Silver Mining Co.*, 279
2. SAME — VALID ONLY WITHIN SURFACE. — In such case the location may be valid for all that can be found within the surface lines, but beyond those lines an essential element of the right to follow the lode is wanting, and therefore the right cannot exist. *Id.*

MISRECITAL. See *Indemnity*, 2.

MISTAKE. See *Equity*, 10, 11. *Indemnity*, 3.

MORTGAGE. See *Negotiable Paper*, 1, 4.

1. MORTGAGE — EFFECT OF COVENANTS OF WARRANTY UPON AFTER-ACQUIRED TITLE.— A mortgage containing covenants of general warranty will, as between mortgagor and mortgagee, pass an after-acquired title. *Edward* v. *Davenport*, 34
2. SAME — SAME — DEED OF MARRIED WOMAN.— This rule does not apply to such covenants contained in the deed of a married woman, which amount to nothing more than a release of dower, and do not estop her to claim an after-acquired title. *Id.*
3. CHATTEL MORTGAGE — RETENTION OF POSSESSION BY MORTGAGOR WITH POWER TO DEAL WITH THE PROPERTY.— A mortgage of chattels which provides that the mortgagor may retain possession of the property, and continue to deal with it as his own, selling therefrom from time to time, is at least constructively fraudulent as to creditors, and therefore void; and the same result follows where such a mortgage does not upon its face provide for the retention of possession by the mortgagor, and that he may continue to deal with the property as his own, but where it is shown by proof that such was the understanding of the parties, and that the mortgagor did in fact retain possession of the goods, and continue to deal with them as his own by selling portions thereof, etc. *Argall* v. *Seymour et al.*, 55
4. SAME — SAME — SUBSEQUENT DELIVERY TO MORTGAGEE.— Where a mortgage of chattels makes no provision authorizing the mortgagor to continue in possession, and to deal with the property mortgaged, and the mortgagee delays for a brief period to take possession under it, and permits the mortgagor during that period to deal with it as his own, this of itself, in the absence of proof of actual and intentional fraud, will not render the mortgage void in law. It may be held good if possession be delivered before any rights of third parties have intervened; that is, from the time of such delivery it may be held to be as valid as if executed at the date of such delivery. *Id.*
5. RIGHTS OF INNOCENT THIRD PARTIES.— As to persons who deal with the mortgagor after the execution of the mortgage, and before its recording, and while the possession remains with the mortgagor, the court holds that they may be treated as having dealt upon the faith of his ownership of the goods, he being then in possession. *Crook's Assignee* v. *Stewart et al.*, 2 McCrary, 12. *Id.*

MOTIVE. See *Criminal Law*, 4.

MUNICIPAL CORPORATION. See *Corporation*, 26, 27, 28, 29.

NEGLIGENCE. See *Carrier*, 4. *Employee*, 4.

1. NEGLIGENCE — NECESSARY ALLEGATIONS BY PLAINTIFF. — In an action by a servant for damages caused by the incapacity of a fellow-servant, the plaintiff must allege that the injury was not caused or contributed to by his own negligence; and also that he was not informed of the unfitness of the fellow-servant. *Dunmead* v. *Am. Min. & S. Co.*, 244
2. RAILROAD — NEGLIGENCE — INJURY TO PASSENGERS — PLEADING. — The plaintiff, in a suit against a railroad company to recover damages for injuries received while traveling as a passenger on the defendant's cars through the defendant's negligence, is not bound to state, in his declaration, the particular facts constituting the negligence. It is sufficient to state generally that the injury was the result of the defendant's negligence. *Clark* v. *C., B. & Q. R'y Co.*, 360
3. NEGLIGENCE DEFINED. — Negligence is the want of that care and prudence which a man of ordinary intelligence would exercise under *all* the circumstances of the case. *Harris* v. *U. P. R'y Co.*, 454
4. SAME — BURDEN OF PROOF — PROXIMATE CAUSE. — Negligence is a question of fact to be found by the jury, and, in order to recover, the plaintiff must establish by a fair preponderance of proof that the defendant was guilty of negligence, and that the injury complained of was the natural and ordinary result of such negligence, and that the negligence was the proximate cause of the injury which a reasonably prudent and cautious person ought to have apprehended might result from the act which he did. *Id.*
5. CONTRIBUTORY NEGLIGENCE — MASTER AND SERVANT. — When the master, or another servant standing toward the servant injured in the relation of superior or vice-principal, orders the latter into a situation of danger, and he obeys and is thereby injured, the law will not charge him with contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even under orders from one having authority over him. *Miller* v. *U. P. R'y Co.*, 115
6. SAME — RAILROAD COMPANY TO KEEP TRACKS CLEAR. — While a railroad company is bound to use great care in order to keep its tracks clear for the safety of its passengers, and for its employees, it is not responsible for the unlawful act of some third party in placing obstructions upon the track without its knowledge or consent, unless it be in the case where it had by its conduct done some act which it might reasonably have anticipated would lead to the placing of the obstruction upon the track. *Harris* v. *U. P. R'y Co.* 454

NEGLIGENCE — continued.

7. SAME — MEASURE OF DAMAGES. — In determining the amount of damages, the jury should consider the pain and suffering to which plaintiff has been subjected, both mental and physical, the loss of time and loss of wages which has resulted from his injury, the nature and extent of his physical injuries, their effect upon his ability to earn his living since the accident as compared with his ability to do so before, and the probable effect of those injuries upon his future health and strength. Under all these circumstances, and in view of all these facts, they should estimate the damages, and give him such sum as they think will be a reasonable, not an unreasonable compensation. *Id.*

8. HIGHWAY CROSSINGS ON RAILROADS — NEGLIGENCE — PERSONAL INJURIES. — The liability of a railroad company for death or personal injuries caused by the neglect of the company to put up at highway crossings the sign-board to warn travelers along the highway of danger from the proximity of the railroad train, does not attach absolutely under the statute where it appears the damages sustained were the result of the injured party's own negligence, and were not caused by the absence of the sign-board. *Field* v. *C., B. & Q. R'y Co.*, 573

9. SAME — STATUTE CONSTRUED — SIGN-BOARDS AT CROSSINGS. — The intention of the statute was not to create an absolute liability on the part of the railroad company, but to make the failure to provide sign-boards at highway crossings conclusive evidence of negligence on the part of the company. *Id.*

10. NEGLIGENCE — PERSONAL INJURIES — PROXIMATE CAUSE — DAMAGES. — To obtain a verdict for damages by reason of alleged negligence, it must be proven that the negligence of the defendant was the proximate cause of the injury. *Huff* v. *Minneapolis & St. L. R. Co.*, 622

11. SAME — RAILROAD COMPANY — DUTY UNDER LEASE. — A railroad company, having by lease the right to use the depot grounds and tracks of another company, owes the same duty to passengers of that company lawfully on the ground as it does to its own. *Id.*

12. SAME — DUE DILIGENCE. — The question, what constitutes "due diligence?" in an action to recover damages caused by negligence, is one for the jury, and the *burden of proof* in such case is with the plaintiff to show the negligence. *Id.*

13. SAME — CONTRIBUTORY NEGLIGENCE — CHOICE BETWEEN HAZARDS. — Where one, in the face of great danger, and obliged to choose between two hazards, makes such choice as a person of ordinary prudence and care placed in the same situation

NEGLIGENCE — continued.

might make, and is thereby injured, the fact that if he had chosen the other hazard he would have escaped injury will not relieve the one by reason of whose negligence he was put in jeopardy. *Id.*

14. NEGLIGENCE — FELLOW-SERVANT — LIABILITY OF EMPLOYER. — One who contracts to perform labor or render services for another takes upon himself those risks, and only such, as are usually incident to the employment engaged in, and in the absence of statute the negligence of a fellow-servant is a risk assumed by the employee, and for which the employer is not liable. *Thompson* v. *Chicago, M. & St. P. R'y Co.*, 629

15. SAME — EMPLOYEE UNDER CONTROL OF ANOTHER. — Where the employer places one employee under the control and direction of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger, and thus exposes him to extraordinary peril, of the existence and extent of which he is not advised, the employer is liable. *Id.*

16. SAME — DANGER KNOWN TO EMPLOYER OR HIS AGENT. — If the employer or his authorized agent leads the employee to expose himself to a danger not ordinarily incident to the employment, which is known to the former and unknown to the latter, whereby the latter is injured, an action lies against the employer to recover damages for the injury. *Id.*

17. SAME — APPARENT OR KNOWN DANGER. — If the danger is apparent, and is as well known to the employee as to the employer, the former takes the risk of it; but if the employer knew, or by the exercise of ordinary care might have known, that the employment was hazardous to a degree beyond what it fairly imports, he is bound to inform the latter of such fact. *Id.*

18. SAME — CONTRIBUTORY NEGLIGENCE — RULE OF. — The rule of contributory negligence applies to a case of this character, but with much less force than to a case where a servant is injured in the ordinary course of his employment, and not exposing himself to unusual dangers in obedience to the orders of his superiors. *Id.*

19. SAME — OBEDIENCE TO ORDERS OF SUPERIOR. — The servant may obey the order of his superior and perform his duty unless the danger in doing so is so apparent that a man of ordinary prudence would refuse to undertake it, even under the orders of his employer. *Id.*

20. SAME — KNOWLEDGE OF DANGER — A QUESTION OF FACT. — It is a question of fact for the jury whether, under the circumstances of the case, the party injured knew, or in the exercise of ordinary care and prudence might have known, that the danger was extraordinary. *Id.*

NEGLIGENCE — continued.

21. MUNICIPAL CORPORATION — NEGLIGENCE — FAILURE TO KEEP SIDEWALKS IN REPAIR. — A municipality having, by its charter and by-laws, charge of the streets and sidewalks, with power to compel by assessment repairs to the same, is bound to keep them in good and safe condition, and will be liable for damages to a person who, without negligence on his part, is damaged by reason of its failure to so repair, provided the city authorities knew the existence of the cause of the injury, or were informed of it, or such a state of circumstances is disclosed that notice would be implied. *Delger* v. *City of St. Paul*, 634

22. BURDEN OF PROOF — CONTRIBUTORY NEGLIGENCE TO DEFEAT RECOVERY. — The burden of proof is with the plaintiff to establish negligence. If the plaintiff materially contributed to the injuries by her own negligence, she cannot recover. The law in such cases is well settled, and the question is purely one of facts for the jury. *Id.*

NEGOTIABLE INSTRUMENT. See *Negotiable Paper.*

NEGOTIABLE PAPER.

1. NEGOTIABLE PAPER SECURED BY MORTGAGE — RIGHTS OF BONA FIDE PURCHASER. — The *bona fide* purchaser of negotiable paper, secured by mortgage, before maturity and without notice, takes the mortgage, as he does the notes, freed from equities arising between the previous parties thereto, and also freed from any latent equity existing in an assignee in bankruptcy, at the time of the assignment of the notes, of which latent equity there is no notice actual or constructive. *Myers* v. *Hazzard*, 94

2. SAME — SAME — EXTENT OF PROTECTION EXTENDED TO BONA FIDE PURCHASER. — The *bona fide* purchaser of negotiable notes secured by mortgage, where the mortgagor had the legal title and possession of the mortgaged property, but held it fraudulently, is entitled to the same protection that would be accorded to the purchaser of property from a fraudulent vendee in good faith and without notice of the fraud. Such a purchaser would be unaffected by latent equities of third parties of which he had no notice. *Id.*

3. LIS PENDENS — NEGOTIABLE INSTRUMENTS. — Negotiable instruments are not subject to the rule of *lis pendens*. The pendency of a suit in Nebraska to restrain the payee of certain notes from negotiating them, the injunction not being served upon the holder of said notes, *held* no notice to a purchaser of said notes in Chicago, Illinois. *Id.*

4. RIGHTS OF PURCHASERS OF UNDER-DUE NEGOTIABLE PAPER SECURED BY MORTGAGE. — The general rule, announced above in

NEGOTIABLE PAPER — continued.
the first head-note, further considered, and some exceptions and limitations of the doctrine stated. *Id.*
5. NEGOTIABLE INSTRUMENT — UNCERTAINTY IN. — Where the instrument is uncertain as to amount and time of payment of attorney's fees to be paid in case of suit brought on the note, and uncertain as to the person to whom payable, and dependent on the contingency of the bringing of suit thereon, it is not a negotiable instrument under the laws of Minnesota. *Hardin* v. *Olson*, 643

NEW TRIAL. See *Trial. Verdict.*

NON COMPOS MENTIS. See *Contract*, 3.

NON-RESIDENT. See *Corporation*, 23. *Practice*, 7.
1. SUIT BY NON-RESIDENT — BOND FOR COSTS. — Under the statutes of Colorado, a suit brought by a non-resident of the state must, on motion by defendant in apt time, be dismissed, unless bond for costs was executed and filed at the time of the commencement of the suit. To execute the bond two days after the action is instituted will not avail. *Sutro* v. *Simpson*, 276
2. SAME — REMOVAL TO FEDERAL COURT. — Though no bond for costs is required in case of suit originally brought in the United States court, yet when a cause is removed from the state court to the federal court, the latter begins where the former left off; and motion to dismiss for want of bond for costs having been entered in the state court, and pending at the time of removal, will be heard in the federal court and determined in accordance with the law applicable to the motion when made. *Id.*

NOTICE. See *Attorney and Client*, 3. *Contract*, 3. *Estoppel*, 3.

OBLIGATION. See *Corporation*, 21.

OFFICIAL DUTY — VIOLATION OF. See *Trust*, 2.

OFFICERS. See *Corporation*, 1, 2, 3, 4, 5. *Land*, 2. *Marshal*, 1.

ORDER. See *Probate Court*, 1.

ORDINANCE. See *Right of Way.*

OUSTER. See *Practice*, 1.

OWNERSHIP. See *Corporation*, 17.

PAPER. See *Negotiable Paper.*

PARTY. See *Contract*, 1, 5. *Equity*, 8, 9. *Evidence*, 4. *Mortgage*, 4. *Pleading*, 7, 8, 9, 10, 11. *Practice*, 1, 7. *Removal*, 1, 2, 4, 5.

PAROL EVIDENCE. See *Evidence*, 3. *Insurance*, 11.

PASSENGER. See *Negligence*, 2. *Railroad*, 1, 2, 3, 4, 5, 6, 7.

PATENT. See *Ejectment*, 1. *Land*, 3.

1. PATENT LAWS — RIGHTS OF PATENTEE.— The sole object of the patent laws is to give to the inventor a monopoly of what he has discovered. What is granted to him is the exclusive right— not the abstract right — but the right in him to the exclusion of everybody else. He is not authorized by the patent laws to manufacture and sell the patented article in violation of the laws of the state. His enjoyment of the right may be modified by the exigencies of the community to which he belongs, and regulated by laws which render it subservient to the general welfare if held subject to state control. *In re Brosnahan*, 1
2. PATENT — IN WHAT SENSE A CONTRACT.— A patent is a contract only as between the parties to it, namely, the United States on one side and the patentee on the other, and the rights conferred thereby can extend no further than the right granted to the patentee under the patent laws. *Id.*
3. REGULATION OF COMMERCE.— The statute above mentioned is not a regulation of commerce among the several states. *Id.*
4. DEPRIVATION OF LIBERTY OR PROPERTY — FOURTEENTH AMENDMENT TO THE CONSTITUTION.— The statute above named does not deprive any person of liberty or property without due process of law, within the meaning of the fourteenth amendment to the constitution. *Id.*
5. PATENT — PROCESS.— By process is meant the application or operation of some element or power of nature, or of one subject to another; as for example, the art of tanning, dyeing, smelting ores, and the like. In such cases, the invention consists in the application of old and well-known principles to new and useful purposes. *Boyd* v. *Cherry*, 70
6. SAME — INFRINGEMENT.— Where a manufactured article may be used for several purposes, one of which is protected by patent, and a manufacturer makes and sells it to customers, with instructions how to use it in violation of the patent, the inference arising from their sale with such instructions is very strong that the intent is to violate the patent, and standing alone is sufficient proof thereof. *Id.*
7. PRIOR USE — VALUABLE RESULTS — UTILITY.— In order to establish the defense of prior use, it must appear that the prior discoverer or inventor had such a conception of the invention as would have enabled him to give it to the public. A prior inventor is one who first discovers the principle, and, by putting it into practice and intelligent use, first makes it available to man. Results accidentally and unwittingly produced, while the operators were in pursuit of other and different results, without exciting attention, will not amount to prior discovery and use. *Id.*

PATENTEE. See *Patent.*

PAYMENT COMPELLED. See *Corporation*, 26.

PENALTY. See *Indemnity*, 1.

PERSONAL INJURY. See *Negligence*, 8, 10.

PETITION. See *Removal*, 18.

PLEADING. See *Dismissal*, 1. *Equity*, 5, 6, 7. *Indemnity*, 1, 2, 3, 4. *Negligence*, 1, 2. *Removal*, 3, 17.

1. PLEADING — FORMER JUDGMENT AS AN ESTOPPEL.— Where a judgment of record in a former suit is pleaded as an estoppel, which does not on its face show that the verdict was rendered upon the same issues as those in the suit on which it is pleaded, evidence *aliunde* is required to prove that the precise point involved was submitted to the jury. *Merchants' International Steamboat Line* v. *Lyon*, 145

2. SAME — FORMER JUDGMENT AS A BAR — PROOF ALIUNDE.— Where the answer of the defendant sets up the same defense as the answer in the former suit, admissions by counsel, in connection with the offer of the record as evidence, that testimony upon both defenses of the former action was admitted and went to the jury, relieves the uncertainty in the record, and shows that the question raised by the pleadings in the present suit was litigated and determined in the former suit. *Id.*

3. AFFIRMATIVE MATTER IN ANSWER — REPLICATION.— In ejectment for a mining claim, where defendant sets up title in himself, the plaintiff must reply. *Newman* v. *Newman*, 293

4. PLEADING — REPLICATION — SURPLUSAGE.— Where sufficient probative facts appear, a reply is not demurrable because it also contains allegations as to mere matters of evidence. *Fletcher* v. *N. Y. Life Ins. Co.*, 440

5. PLEADING — ACTION PENDING IN STATE COURT — FOREIGN JURISDICTION.— As the jurisdiction of a United States court cannot properly be considered as foreign in relation to the jurisdiction of a state court within the same territorial limits, an action pending in a state court may be pleaded in abatement of a subsequent action commenced between the same parties in the United States court for the district embraced by such state, for the same subject matter and the same relief. *Radford* v. *Folsom*, 527

6. SAME — FORMER ACTION — PENDENCY OF ACTION IN OTHER STATE.— While an action pending in the courts of one state cannot be pleaded in abatement of an action commenced in the court of another state, even if there be identity of parties, of subject matter, and of relief sought, the two jurisdictions being *foreign* to each other, the pendency of a former suit at law or in equity between the same parties, for the same cause and the

PLEADING — continued.

same relief, in a court of the state in which the second suit has been brought, will be cause of abatement if pleaded in the second suit. *Id.*

7. PLEADING — JOINT ACTION AGAINST CORPORATION AND STOCKHOLDERS.— Under section 201 of the chapter relating to corporations in the state of Colorado, a joint action may be maintained against a corporation and the owners of unpaid capital stock thereof, and a count in a complaint based upon this section is not demurrable for misjoinder of parties. *Smith* v. *Colo. Life Ins. Co.*, 581

8. SAME — MAKING REPORT.— A joint action cannot be maintained against the officer of a corporation and the corporation itself for failure to comply with section 206 of the chapter relating to corporations, requiring a report to be made stating the amount of its capital, existing debts, etc. *Id.*

9. SAME — FAILURE TO ORGANIZE LEGALLY.— When persons get together and assume to be a corporation, without complying with the terms of the statute in regard to organization of corporations, they may be severally and jointly liable as individuals for the debts contracted in the corporate name, but they cannot be made *joint defendants with such corporation* in an action. *Id.*

10. PLEADING — CORPORATIONS.— Where parties joined as libelants are corporations the libel should so aver. *Ins. Co.* v. *Miss. Valley Transp. Co.*, 686

11. SAME — JOINDER OF PARTIES.— Where goods belonging to different parties are shipped by the same vessel, and are injured by a common disaster caused by the same act of negligence on the carrier's part, the different shippers or their assignees may join in filing a libel in admiralty to recover their damages. *Id.*

12. SAME.— In such cases the demand of each libelant should, it seems, be alleged in a distinct article. *Id.*

13. SAME — PLEADING — EXHIBITS.— Where the cause of action set forth in a libel has arisen from the violation of a written contract of affreightment, the libel should so state, and the contract should be annexed to the libel, or a legal excuse for its absence given. *Id.*

14. AMENDMENT — AS TO SUBSEQENT FACTS.— In an action to cancel notes, etc., alleged to have been procured by duress, it may be competent as matter of evidence to prove the subsequent killing of the party who executed the notes by the person charged with the duress, but this is not a matter proper to be set up in an amended complaint by the administrator of the deceased. *Lyster* v. *Stickney*, 109

15. AMENDMENT — INSOLVENCY OF DECEASED.— But the administrator in such case may, by way of amendment, set up the insolvency of his intestate at the time the papers were executed. *Id.*

PLEADING — continued.

16. ISSUE — MATERIALITY OF. — In the matter of the sale of wine to a merchant or dealer, an issue joined as to the correctness of a representation by the seller to the purchaser that there was a demand for the article, and that it was salable in the country embraced in his trade, is a material issue, upon which a jury may find the facts. *Wine Co.* v. *Brasher Bros.*, 247

17. SAME — SAME — WAIVER. — Where the issue tendered by the answer is of a doubtful character, but is joined by the plaintiff, the latter waives the right to raise the question of the materiality of the issue — especially after verdict, upon a motion for a new trial. *Id.*

PLEDGE. See *Corporation*, 24.

POLICY. See *Carrier*, 2. *Equity*, 11. *Insurance*, 1, 2. *Public Policy.*

POSSESSION. See *Mortgage*, 3.

POSTMASTER. See *Criminal Law*, 1. *Postoffice*, 1.

POSTMASTER GENERAL. See *Postoffice*, 1, 2, 3.

POSTOFFICE.

1. POSTMASTER — DUTY TO OBEY LAWFUL ORDERS OF THE POSTMASTER GENERAL — INJUNCTION. — A postmaster being an officer subordinate to the postmaster general, is bound to obey the orders of the latter respecting the location of a postoffice within a city, and the courts will not undertake to enjoin him from so doing. *Western Star Lodge* v. *Schminke*, 366

2. POSTOFFICE — REMOVAL FROM ONE BUILDING TO ANOTHER IN THE SAME TOWN OR CITY. — The power to remove a postoffice from one building to another in the same town or city is vested by law in the postmaster general, and can be exercised by him at his discretion. *Id.*

3. LEASE OF POSTOFFICE BUILDING — POWER OF POSTMASTER GENERAL. — A lease of certain premises for use as a postoffice for a term of four years does not deprive the postoffice department of the power to remove the postoffice during that time. *Id.*

POWER OF ATTORNEY. See *Attorney and Client*, 4.

1. POWER OF ATTORNEY — GENERAL AUTHORITY — CONSTRUCTION. — A power of attorney, general in terms, will be strictly construed, and the authority conferred will not be extended beyond that which is given in terms, or which is necessary or proper for carrying the authority so given into full effect. General language used in connection with a particular subject matter will be presumed to be used in subordination to that matter, and is to be limited accordingly. *Renwick* v. *Wheeler*, 119

POWER OF ATTORNEY — continued.

2. SAME — SUBJECT MATTER. — Where the particular subject matter of a power of attorney was the business of one W., in the state of Iowa, relating to his real estate, including selling, mortgaging, leasing, collecting moneys due for rents, or as purchase money, including the satisfaction of mortgages, *held*, that a clause in such power of attorney, giving the agent "unrestricted power and authority," and power to act "as general attorney in fact," was sufficient to authorize him to settle a mortgage debt by taking the mortgaged property in full satisfaction. *Id.*

POWER OF COURT. See *Judgment*, 1, 2, 7, 10.

POWERS. See *Debt*, 2.

1. POWERS — WHEN CANNOT BE DELEGATED. — Whenever trusts or discretionary powers are to be exercised, the exercise thereof cannot be delegated. *Coquard* v. *Chariton Co.*, 539

PRACTICE. See *Corporation*, 15. *Equity*, 7, 8, 9.

1. PRACTICE — SUPPLEMENTAL BILL BRINGING IN PARTIES NOT AUTHORIZED TO SUE, NOT MAINTAINABLE — OUSTER OF JURISDICTION. — Bill having been filed by the Adams Express Company, which, being a foreign corporation, having the right to sue in this court, a supplemental bill joining, as co-plaintiff, Wells, Fargo & Co., a corporation created by act of the territorial legislature of Colorado, will not be allowed. It cannot be maintained that the complainant in a suit may voluntarily transfer all or a part of his interest in the subject matter of the litigation to a citizen of the same state with the defendant without ousting the jurisdiction. *Adams Exp. Co.* v. *D. & R. G. R'y Co.*, 77

2. PRACTICE — REHEARING, EFFECT OF. — When a rehearing is granted for the reason that the court, upon the pleadings and proofs as they stood at the hearing, is inclined to doubt the correctness of the decree, it is the proper practice to set aside such decree until the case is again heard. It would be otherwise if rehearing was granted in order to allow additional proof. In the latter case the decree should stand pending the rehearing. *Rogers* v. *Marshall*, 307

3. PRACTICE — REHEARING AFTER INTERLOCUTORY DECREE. — It is competent for a court of equity, at any time before the signing of final decree, to reconsider and modify or set aside any of the interlocutory rulings or orders made in the course of the proceeding; and where a case has been referred to a master, the final hearing is when the master's report comes in and is considered on exceptions. *Clark* v. *Blair*, 311

PRACTICE — continued.

4. PRACTICE — EQUITY — PRELIMINARY INJUNCTION.— This court will not, however, grant a preliminary injunction in a case like the present, and the motion, therefore, must be denied. *D. & R. G. R'y Co.* v. *A., T. & S. F. R'y Co.*, 325

5. EQUITY PRACTICE — REFERENCE — ACCOUNTING.— Where the proof fails to furnish a proper basis for an accounting, but enough appears to make it desirable that the real facts be made to appear, the court may, in its discretion, refer the case to a master, with power to take further testimony and report thereon as to both law and fact. *Ridenbaugh* v. *Burns*, 522

6. PRACTICE — AMENDMENT OF VERDICT — REV. ST. § 954.— Section 954 of the Revised Statutes of the United States authorizes the amendment of informal verdicts, so as to make them conform to technical requirements. *Gay* v. *Joplin*, 459

7. PRACTICE — SERVICE ON PARTIES NON-RESIDENT — ACT OF CONGRESS, MARCH 3, 1875, § 8.— The eighth section of the act of congress of March 3, 1875, authorizes the bringing in of parties to a suit who are *non-residents* of the district where the suit is brought, by service of an order of the court, as therein provided. *Castello* v. *Castello*, 543

8. SAME — "CLOUD ON TITLE" — EQUITABLE RELIEF — JURISDICTION.— When a complainant alleges in her bill that she was fraudulently induced to execute an agreement to receive less than her lawful share of her husband's estate, and that the estate is being divided according to such fraudulent agreement instead of being distributed in accordance with the laws of the state where it is being administered, the suit must be considered as instituted "to remove a cloud upon title to personal property," within the meaning of section 8 of the act of March 3, 1875, and as calling for equitable relief within the jurisdiction of the United States circuit court. *Id.*

PREFERENCE. See *Corporation*, 25. *Insolvency*, 1.

PRELIMINARY INJUNCTION. See *Practice*, 4.

PRESUMPTION. See *Judgment*, 5.

PRINCIPAL AND AGENT.

1. PRINCIPAL AND AGENT — ADVANCES BY AGENT — RECOVERY OF. If a principal employs an agent to transact a legitimate business for him, and in conducting such business the agent is authorized to advance money on his principal's account, the law protects the agent, and he may recover the money so advanced if the transactions are legitimate. *Bartlett* v. *Smith*, 388

PRIOR USE. See *Patent*, 7.

PRIVILEGE. See *Witness*, 1.

PRIVILEGED COMMUNICATION. See *Libel*, 1.

1. COMMUNICATIONS — WHEN CEASE TO BE PRIVILEGED. — A communication which would otherwise be privileged, if made with malice in fact, or through hatred, ill-will, and a malicious design to injure, is not a privileged communication, but the burden of proof is on plaintiffs to show malice in fact. *Erber & Stickler* v. *Dun & Co.*, 160

2. MERCANTILE AGENCY — VERBAL STATEMENTS. — The verbal statements of a mercantile agency, made in relation to the plaintiffs' business credit and standing as merchants, to their subscribers, who had an interest in knowing the facts, and in answer to inquiries made by them, if made in good faith and upon information on which defendant relied, are privileged, and cannot be made the foundation of an action. *Id.*

PRIVITY. See *Contract*, 3, 6.

PROBATE COURT.

1. ORDER OF PROBATE COURT — CONCLUSIVENESS OF. — An order of a probate court approving the final report of an administrator and discharging him from his trust may be attacked and set aside in a court of equity upon satisfactory proof that the administrator has failed, either by mistake or fraud, to account for money collected by him, or for property which came into his hands by virtue of his office. *Ridenbaugh* v. *Burns*, 522

PROBATE — WILL. See *Will*.

PROCESS. See *Patent*, 4. *Witness*, 1.

PROFITS. See *Corporation*, 19.

PROMISE. See *Estoppel*, 4.

PROOF. See *Equity*, 2, 5. *Evidence*, 2. *Former Adjudication*, 3. *Insurance*, 13. *Negligence*, 4, 22. *Pleading*, 2.

PROPERTY. See *Corporation*, 26. *Patent*, 4. *Redemption*, 2. *State Supreme Court*, 1, 2, 3.

PROVINCE OF JURY. See *Identity*, 1. *Libel*, 4, 5. *Railroad*, 8.

PROXIMATE CAUSE. See *Negligence*, 4, 10.

PUBLICATION. See *Review*, 2. *Service*, 1.

PUBLIC BUILDING. See *Construction*, 1.

PUBLIC DOMAIN. See *Right of Way*, 1.

PUBLIC LAND. See *Land*, 1, 2.

PUBLIC POLICY. See *Carrier*, 2. *Corporation*, 1.

PURCHASER. See *Negotiable Paper*, 1, 2, 4.

RAILROAD. See *Constitution*, 1. *Corporation*, 11, 12. *Eminent Domain*, 1. *Foreclosure*, 1. *Negligence*, 2, 3, 4, 5, 6, 11. *Right of Way*, 12.

1. RAILROADS — EJECTING PASSENGER FROM TRAIN. — Where the legal right of a conductor of a railroad train to eject or remove a passenger from the cars exists, he must effect the removal at a proper place and in a proper manner, and with no more confusion, force or violence than is reasonably necessary for the purpose. *Gallena* v. *Hot Springs R. Co.*, 371
2. SAME — DUTY OF CONDUCTOR IN EJECTING PASSENGER. — Before a conductor can require a passenger to get off the cars he should stop the train at a station or depot, or where he could be put off without injury or danger of injury. He has no right to forcibly eject a passenger at such a place and in such a manner as his whim, caprice or malice may dictate or suggest. *Id.*
3. SAME — ACTION — PROVINCE OF JURY. — In an action for damages for violent ejection from a car by the conductor, it is the province of the jury to reconcile differences in the testimony, and to decide as to the credibility of the witnesses, taking into consideration the relation they sustain to the case, their probable motives, their demeanor, and their opportunities of knowing and seeing the facts about which they testify, and the reasonableness or unreasonableness of their testimony, in view of the knowledge of human nature, and the established and undoubted facts in the case. *Id.*
4. ASSAULT ON PASSENGER. — Where a conductor, with a loaded revolver in his hand, approached a passenger before making any effort to induce him to get off, and when the passenger had not made, or threatened to make, forcible resistance to his authority, the conductor was guilty of a gross outrage. *Id.*
5. SAME — THREATS. — With or without the use of a deadly weapon, a conductor has no right to compel a passenger, by commands or threats, to jump from a moving train. *Id.*
6. RAILROAD COMPANIES — DUTY OF — LIABILITY. — The law makes it the duty of railroad companies to employ competent, safe and civil men to discharge the duties of a conductor, and for the assaults, injuries and wrongs inflicted on a passenger by a conductor, in the course of his employment as such, the railroad company is responsible. *Id.*
7. SAME — DAMAGES — EXEMPLARY DAMAGES. — where the plaintiff was put off the train in an improper manner and at an improper place, he is entitled to recover a reasonable compensation for bodily injury, and mental suffering and anguish, resulting from the assault; and where the injury has been wanton and mali-

RAILROAD — continued.

cious, a further compensation by way of punishment or exemplary damages, in the discretion of the jury. *Id.*

8. RAILROAD COMPANIES AS CARRIERS.— A railroad company is not bound to undertake the carriage of goods beyond the terminus of its road; but if it does enter into a contract to do so it is bound by it, and is under the same obligation to furnish means of conveyance beyond the line of its own road as it is upon it. *Bussey* v. *Memphis & L. R. R. Co.*, 405

9. SAME — WHEN MAY REFUSE FREIGHT — DUTY OF.— A railroad company may rightfully decline to receive freight offered, when it has not the requisite rolling stock and equipments to carry it without delay; but if it receives goods for transportation it can only escape responsibility for delay by a previous accumulation of freight at its depots, by acquainting the shipper, when he offers goods for carriage, with the facts, and affording him the option of acquiescing in the delay, or seeking some other line of transportation. *Id.*

10. SAME — CONNECTING LINES — THROUGH BILLS OF LADING — DELAY IN TRANSPORTATION.— Through bills of lading impose on the railroad company, as carrier, the obligation to provide means of transportation for the goods shipped to their ultimate destination without delay, and it is no excuse for the non-performance of this duty that it could not procure transportation by boat by reason of a previous accumulation of freight, of which it was advised when it received the goods for transportation. *Id.*

11. SAME — MEASURE OF DAMAGES FOR DELAY.— The measure of damages for delay by a carrier in the transportation and delivery of goods at their point of destination is the difference in the market value of the goods at such destination on the day they ought to have been delivered, and the market value on the day they were delivered. *Id.*

12. DISCRIMINATION IN RAILROAD FREIGHTS — DAMAGES, HOW COMPUTED.— Where, at a former term of the court, it was decided that the receiver of a railroad company, by the adoption of a contract with a third party, and settlements with him thereunder, had discriminated against the plaintiffs in the rates charged them for transportation of wheat and grain over the railroad operated by him, contrary to the provisions of the state statute, and that plaintiffs were entitled by law to have their grain transported over said road at rates which would put them on an equal footing with said third party for like transportation, and it was referred to a special master to take an account of the amount of such unfavorable discrimination, and to report the result of such examination, *held*, that the amount of the fund which, under the contract, could be used to pay such third

RAILROAD — continued.

party's commissions, and all expenses incident to the business and the receiver's freight, is the difference between the prime cost of the wheat shipped and the net proceeds of sales, deducting freights and charges incurred upon other roads, and after the shipment left the receiver's road; and that the amount of discrimination is the difference between such amount, after deducting therefrom expenses, compensation, rent of warehouses, interest, exchange, insurance, and the outlay at way stations made by the receiver to secure the trade, and the amount of the freight charged to such third party according to tariff rates; and that a decree be entered accordingly. *Greisser* v. *McIlrath*, 412

RATIFYING SALE. See *Contract*, 12.

REAL ESTATE. See *Will*, 1.

RECEIVER. See *Fraud*, 2.

RESCISSION. See *Contract*, 12. *Trustee*, 2.

1. RESCISSION — WHEN CONTRACT INDUCED BY FRAUD. — When the contract has been induced by fraud, it is not necessary that the party seeking to rescind it should absolutely tender what he has received under it. It *is* necessary that he should give notice of his intention to rescind, and that upon the trial he should be in a situation to put the other party in the situation in which he was at the time of the discovery of the fraud. That the contract is partly executed at the time of the discovery of the fraud, will not, in itself, prevent a rescission, unless the greater part of the subject matter thereof has been disposed of. *Am. Wine Co.* v. *Brasher Bros.*, 247

RECOVERY. See *Corporation*, 18. *Principal and Agent*, 1.

REDEMPTION.

1. REDEMPTION — JUNIOR LIENHOLDER. — Under the statutes of Iowa the holder of a simple judgment lien has not an equitable right to redeem from a senior lienholder after the execution of a sheriff's deed made pursuant to a sale thereunder. *Burham* v. *Fritz*, 410
2. SAME — RULE OF PROPERTY — STATE DECISIONS TO GOVERN. — The decision of the supreme court of a state as to the rule of property will be followed by the federal courts sitting within the district included in such state. *Id.*

REFERENCE. See *Practice*, 5.

REGULATION OF COMMERCE. See *Patent*, 8.

REHEARING. See *Practice*, 2, 3.

RELEASE. See *Contract*, 12.

RELIEF. See *Equity*, 9. *Fraud*, 1. *Practice*, 8.

REMAND. See *Removal*.

REMEDY. See *Corporation*, 27. *Equity*, 14. *Indemnity*, 4. *Removal*, 7.

REMOVAL. See *Foreclosure*, 1, 2. *Non-resident*, 2.

1. REMOVAL — NOMINAL PARTY.— The joining in a suit of a merely nominal party can have no effect either in conferring or excluding jurisdiction; but, as a general rule, trustees and executors are regarded as active, and not merely nominal, parties. *Goodnow* v. *Litchfield*, 215
2. SAME — SAME — COLORABLE ASSIGNMENT.— It will hardly do to affirm that a citizen of Iowa may enter into a contract with a citizen of New York, and, after incurring liability thereunder, may, for the purpose of defeating the jurisdiction of the federal courts, assign such contract, or his right of action thereon, to another citizen of New York, with an agreement that the latter shall prosecute suit to judgment and pay the proceeds, less costs and expenses, to the assignor, who is to remain the real litigant. *Id.*
3. PETITION FOR REMOVAL — WHEN TAKEN AS TRUE.— Upon a motion to remand, the allegations of the petition for removal will be taken as true; but issue may be joined upon the truth of such allegations, and upon hearing the evidence, the court may dismiss or remand, if it appears that there is no jurisdiction. *Id.*
4. REMOVAL — CITIZENSHIP OF PARTIES — ACT OF 1875.— The general rules governing the construction of the second section of the act of congress of March 3, 1875, in so far as they have been determined by the supreme court, stated. *City of Le Mars* v. *Iowa Falls & S. C. R. Co. and Ill. Cent. R. Co.*, 218
5. SAME — SAME — SEPARABLE ACTION.— Where a plaintiff has a cause of action against two defendants, one of whom is a citizen of the same state with plaintiff, and the other a citizen of another state, and where the proof is the same against both, and the same judgment is to be rendered against both, it is not a divisible or separable controversy, and therefore cannot be removed into a federal court upon the application of the non-resident defendant, on the ground alone of citizenship. *Id.*
6. REMOVAL OF CAUSE — TRESPASS — CAUSE REMANDED.— Where an action of trespass was commenced in a state court against a sheriff for the wrongful seizure of goods of plaintiffs as the property of an attachment debtor, and the creditors of such debtor, citizens of another state, procured themselves to be substituted as defendants in the state court in place of said

REMOVAL — continued.

sheriff, and removed the cause to the United States circuit court, *held*, on motion to remand, that the cause be remanded to the state court. *Ohlquist* v. *Farwell*, 401

7. SAME — PLAINTIFF CANNOT BE DEPRIVED OF ALL REMEDY.— Where the real cause of action is between citizens of the same state, citizens of another state cannot, by procuring themselves to be substituted for the defendant, procure the removal of the cause into the federal court, and thereby deprive the plaintiffs of their remedy against the original defendant for a trespass committed by him. *Id.*

8. REMOVAL OF CAUSE.—The act of 1866, providing for the removal of a part of a cause into the federal court, and thereby splitting the action, was repealed by section 2 of the act of March 3, 1875. *Tuedt* v. *Carson*, 426

9. SAME — UNDER ACT OF MARCH 3, 1875.— An action brought by a citizen of the state in which it is brought against citizens of the same state and citizens of another state, cannot be removed from the state court to the federal court by the non-resident defendants, unless the whole suit is removed. *Id.*

10. SAME — SEVERABLE AND INSEVERABLE CONTROVERSY.— Although an action brought by the plaintiff against several defendants is for a tort, in respect to which plaintiff could sue one or all of the tort-feasors, yet if he elects to sue all, it will be deemed so far an inseverable controversy that a part only of the defendants cannot remove the cause into the federal court. *Id.*

11. REMOVAL OF CAUSE — COURTS — SUITS REMOVABLE.— A board of county commissioners of a county created by the laws of the state of Nebraska is in no just or proper sense a *court* within the meaning of the removal acts of congress; and a mere claim against a county for right of way for a public road, while the same is pending before the county board, does not constitute a *suit* within the meaning of the said removal acts. *Fuller* v. *County of Colfax*, 535

12. REMOVAL OF CAUSE — JURISDICTION OF CIRCUIT COURT.— A circuit court of the United States has no jurisdiction of a case commenced in a state court on a contract by an assignee, and removed thence to said court, unless the action might have been brought originally in the circuit court by the assignor, and it is probable that a plea to the jurisdiction would be entertained in a supplemental proceeding. *Mosgrove* v. *Kuntze*, 561

13. REMOVAL OF CAUSE — PETITION.— The allegations of the petition for removal are jurisdictional, and they must be positive and certain; and the allegation that the defendant is an alien, "as plaintiff is informed and verily believes," is insufficient. *Wolf* v. *Archibald*, 581

REMOVAL — continued.

14. SAME — CITIZENSHIP. — Children of citizens of the United States who are born in foreign countries are citizens of the United States. *Id.*

15. SAME — JURISDICTION — REMANDING CAUSE. — In all cases where there is doubt as to the jurisdiction, in a cause removed, the safer practice is to remand the cause to the state court. *Id.*

16. REMOVAL OF CAUSE. — A cause is not removable from a state to a federal court, if it could not have been originally instituted in the federal court by the plaintiff as assignee of the instrument sued on. *Hardin* v. *Olson*, 643

17. REMOVAL — FORECLOSURE — CROSS-BILL. — In a suit to foreclose a mortgage in a state court, the mortgagor and mortgagee being citizens of the same state, a non-resident who is made defendant on the ground that he has or claims an interest in the mortgaged property cannot, by filing a cross-bill alleging that the mortgage is fraudulent and void, so change the character of the suit as to make it removable under the act of congress of March, 1875. *Maish* v. *Bird*, 129

18. SAME — SEPARATE CONTROVERSY. — Such an issue presented by cross-bill is incidental and subordinate, and not a separate controversy distinct from the main case, and which can be determined by itself. *Id.*

RENT. See *Corporation*, 19, 31.

REPLICATION. See *Pleading*, 8, 4.

RETENTION — POSSESSION. See *Mortgage*, 3.

RETURN. See *Corporation*, 26. *Evidence*, 21.

REVENUE.

1. REVENUE LAWS — RULE OF CONSTRUCTION. — If property which, by a previous statute, is declared liable to taxation, is to be exempted under a later act, the exemption must rest upon some clear and unequivocal provision of the statute. *Davenport Nat'l Bank* v. *Mittelbuscher*, 361

REVIEW.

1. BILL OF REVIEW, WHEN TO BE FILED. — The general rule is that a bill of review for errors apparent upon the face of the record must be filed within the time for taking an appeal, which in a case like the present would be two years. *Beach* v. *Mosgrove*, 50

2. SAME — SAME — SERVICE BY PUBLICATION. — Where service was made upon the defendants by publication, and where said defendants had, under the statute, one year after final decree in which to enter their appearance and have the decree set aside, with leave to them to defend, the decree was not final as to the

REVIEW — continued.
absent defendants until the expiration of one year after it was entered. So long as a party has a right to apply for the correction of errors to a court of original jurisdiction, he cannot invoke the powers of an appellate tribunal for that purpose. *Id.*

REVISED STATUTES. See *Bankruptcy*, 5, 6. *Statutes.*

REVOCATION. See *Will*, 2.

RIGHT OF WAY. See *City Ordinance*, 1. *Eminent Domain*, 1.
1. GRANT OF RIGHT OF WAY THROUGH PUBLIC DOMAIN — EFFECT OF — JURISDICTION. — An act of congress granting to a railway company, organized under territorial legislation, right of way through the public domain does not create the corporation, but only grants to an existing corporation certain rights, and constitutes no ground of jurisdiction on the part of the federal courts in a case in which the cause of action does not in any sense rest upon or grow out of the grant of such right of way. *Adams Express* v. *D. & R. G. R'y Co.*, 77
2. RIGHTS OF RAILROAD COMPANIES UNDER CITY ORDINANCE. — A railroad company having submitted to construct its road through a city under an ordinance reserving the right to alter and amend, must submit to such alterations, etc., as are reasonable and necessary. But such an ordinance shall not be amended or repealed so as to affect essential and vested rights, or be allowed to act retrospectively to take away rights previously granted. *C., M. & St. P. R'y Co.* v. *Minn. Cent. R'y Co.*, 606

RIGHTS. See *Crimes*, 3. *Eminent Domain*, 1. *Mortgage*, 5.

RIVERS. See *Admiralty*, 1.

RULE OF PROPERTY. See *Redemption*, 2.

SALE. See *Contract*, 4, 8, 10, 12. *Corporation*, 14, 16.

SATISFACTION. See *Judgment*, 5.

SCHOOL BUILDINGS. See *Construction*, 1.

SCHOOLS.
1. CITIES, AND SCHOOL ORGANIZATIONS THEREIN. — The legislature of Missouri, by organizing district school organizations in cities, towns and villages, intended nothing more than the separation of the control of the public schools from general municipal affairs, and the school buildings are the public buildings of the city, and not of the school district. *Nat. Water-Works* v. *School Dist.*, 198

SECURITY. See *Corporation*, 20.

SEPARABLE ACTION. See *Removal*, 5.

SERVANT. See *Negligence*, 5, 14, 15, 16, 17, 18, 19, 20.

SERVICE. See *Practice*, 7. *Review*, 2. *Witness*, 1.

1. SERVICE BY PUBLICATION — EFFECT OF JUDGMENT UNDER. — The effect of an adjudication based upon service by publication, under the eighth section of the act of congress of March 3, 1875, is limited, as regards the absent defendant or defendants, without appearance, to the property which shall have been the subject of the suit and under the jurisdiction of the court; as to any other property or rights of the absent defendants, it is null and void. *Beach* v. *Mosgrove*, 50

SEWER. See *Corporation*, 29.

SHERIFF'S RETURN. See *Evidence*, 1.

SHIPPING. See *Admiralty*, 1, 2, 3.

SIDEWALK. See *Negligence*, 21.

SPECIAL FINDINGS. See *Verdict*, 1.

STATE COURT. See *Pleading*, 5.

STATE DECISION. See *Redemption*, 2.

STATE STATUTE. See *Habeas Corpus*, 1. *Statute*.

STATE SUPREME COURT. See *Supreme Court*.

STATEMENT — VERBAL. See *Privileged Communication*, 2.

STATUTES — FEDERAL.

Act of 1866, see *Removal*, 8.

Act of 1875, March 3, see *Practice*, 7, 8. *Removal*, 4, 9, 17. *Service*, 1.

At Large, vol. 20, ch. 259, see *Criminal Law*, 1, 2.

Rev. Stat., sec. 725, see *Crimes*, 1.

Rev. Stat., sec. 788, see *Marshal*, 1.

Rev. Stat., secs. 915, 933, see *Insolvency*, 4.

Rev. Stat., sec. 954, see *Practice*, 6.

Rev. Stat., sec. 1014, see *Crimes*, 1.

Rev. Stat., sec. 2414, see *Land*, 3.

Rev. Stat., secs. 5045, 5057, see *Bankruptcy*, 1, 5, 6, 7, 8. *Statute of Limitations*, 2.

Rev. Stat., sec. 5438, see *Indictment*, 1, 2.

STATUTES — STATE.

Colorado, see *Attachment*, 1. *Corporation*, 15. *Non-resident*, 1, *Pleading*, 7, 18. *Statutes*, 2. *Statute of Limitations*, 3.

Iowa, see *Alien*, 1. *Contract*, 4. *Negligence*, 8, 9. *Redemption*, 1. *Statutes*, 5, 6, 7.

STATUTES — STATE — continued.

Iowa, Code, sec. 1576, see *Corporation*, 8, 9, 10. Sec. 2533, see *Corporation*, 23.

Missouri, see *Statute*, 1.

Nebraska, see *Corporation*, 11.

1. STATE STATUTE HELD NOT IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.— The statute of Missouri providing for the punishment by fine and imprisonment of any person who shall manufacture "out of any oleaginous substance, or any compounds of the same, other than that produced from unadulterated milk, or cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream of the same," or who shall sell or offer for sale the same as an article of food, is not in violation of any provision of the constitution of the United States. *In re Brosnahan*, 1

2. ACTS OF TERRITORIAL LEGISLATURE NOT FEDERAL STATUTES — CORPORATION CREATED BY A TERRITORIAL LEGISLATURE, NO RIGHT TO SUE IN FEDERAL COURT.— The legislative power to be exercised by a territorial legislature is the legislative power of the territory, and not of the United States. Territorial statutes have a distinct and well-defined character of their own. A corporation created by the territorial legislature of Colorado is not a federal corporation, and cannot, therefore, sue in the United States courts as such — even if it were conceded that corporations organized under the laws of the United States possess the right to sue in those courts. *Adams Exp. Co.* v. *D. & R. G. R'y Co.*, 77

3. STATE STATUTE — CONSTRUCTION OF BY STATE COURT BINDING ON FEDERAL COURT.— In questions involving the construction of the statute law of a state, the United States courts are bound by the decisions of the supreme court of the state, and will receive the same as conclusive. *Mooney* v. *Humphrey*, 112

4. SAME — CORPORATIONS.— This doctrine is especially applicable to a decision of the highest court of a state affirming the validity of the organization of a corporation of the state. *Id.*

5. SAVINGS BANKS — TAXATION OF STOCK — IOWA STATUTE.— It seems probable that the several statutes quoted in the opinion being construed together, ought to be held to require the stockholders in savings banks to pay taxes upon their shares of stock, at least to the extent that there is no taxation upon the same as against the bank. *Davenport Nat. Bank* v. *Mittelbuscher*, 361

6. STATE STATUTE — PROVINCE OF STATE COURT TO CONSTRUE.— It is the peculiar province of the courts of the state to construe state statutes. *Id.*

STATUTES — STATE — continued.

7. VALIDITY OF STATE LAW — DUTY OF FEDERAL COURT. — The courts of the United States are very reluctant to place upon a state statute any construction which will bring it into conflict with a statute of the United States, and therefore render it void; and where the question is pending before the state courts, the federal courts will be inclined to await their decision. *Id.*

STATUTE — CONSTRUCTION. See *Negligence*, 9.

STATUTE OF FRAUDS. See *Contract*, 4.

STATUTE OF LIMITATIONS. See *Bankruptcy*, 1, 2. *Corporation*, 23.

1. STATUTE OF LIMITATIONS — BONDS AND COUPONS. — The fact that the failure to pay the coupons attached to a bond within six months from their maturity gave the holder of the bond the option to sue for both principal and interest, does not of itself cause the bonds to mature at the date of such default, or at the expiration of said six months, so as to cause the statute of limitations to begin to run. *National Bank* v. *Gas Light & Coke Co.*, 319

2. STATUTE OF LIMITATIONS — OWNERS OF UNOCCUPIED LANDS. — The statute of limitations does not run against the owner of unoccupied lands until some one assumes to take adverse possession; and this rule applies as well to an assignee in bankruptcy, who, under the Revised Statutes, § 5057, must bring suit within two years, as to the original owner. *Gray* v. *Jones*, 515

3. STATUTE OF LIMITATIONS. — The statute of Colorado (sec. 1686, General Laws) which limits the cause of action to two years where the cause of action arose without the state upon contract or agreement, express or implied, does not apply to actions *ex delicto*. Such actions may be brought within six years. *Shippen* v. *Tankersley*, 260

STOCK. See *Corporation*, 14, 16, 18, 28. *Statutes*, 5.

STOCKHOLDERS. See *Corporation*, 8, 9, 13, 15. *Pleading*, 7, 9.

STOCK — SUBSCRIPTIONS. See *Corporation*, 12.

STREET. See *Eminent Domain*.

SUBJECT MATTER. See *Attorney*, 5.

SUBROGATION See *Equity*, 4.

SUBSCRIPTIONS. See *Corporation*, 12.

SUIT BY NON-RESIDENT. See *Non-resident*, 1, 2.

SUPPLEMENTAL BILL. See *Practice*, 1. *Equity*, 5, 6, 7, 9.

SUPREME COURT.

1. DECISION OF SUPREME COURT OF THE STATE — RULE OF PROPERTY. — Where any principle of law establishing a rule of real property has been settled in the state courts, that rule will be applied by the federal courts within the same state, whether it be based upon a construction of a statute or the principles of the common law applied to such titles. *Edwards* v. *Davenport*, 34

2. SAME — SAME. — Decisions of the supreme court of the state respecting the validity, force and effect of a contract entered into by a person of unsound mind, do not constitute a rule of property, though they may incidentally, in a certain class of cases, affect title to property; and such decisions being in conflict with those of the supreme court of the United States on the same subject, will not be followed in this court, in the present case. *Id.*

3. SAME — SAME. — The decisions of the highest court of a state may be said to constitute a rule of property, when they relate to and settle some principle of local law directly applicable to titles. *Id.*

SURETY. See *Indemnity*, 4.

SURFACE WATER. See *Corporation*, 28.

1. SURFACE WATER — INJURY FROM DIVERTING. — The law regarding surface water is that no individual or corporation can make any change thereof to the injury of any one without being responsible in damages for such injury. *Arn* v. *City of Kansas*, 558

SURPLUSAGE. See *Pleading*, 4.

TENANT. See *Landlord*, 1.

TERRITORIAL LEGISLATURE. See *Statutes*.

THIRD PARTY. See *Mortgage*, 4.

THREATS. See *Railroad*, 5.

TIMBER. See *Trespass*, 1.

TIME — CONTRACT. See *Contract*, 8, 9, 10.

TIME — LAPSE. See *Equity*, 1, 2, 3. *Judgment*, 5.

TITLE. See *Equity*, 6, 15. *Jurisdiction*, 3. *Mortgage*, 1, 2. *Practice*, 8.

TRANSCRIPT. See *Criminal Law*, 5.

TRANSFER — ASSETS. See *Corporation*, 20.

TRANSPORTATION. See *Railroad*.

TRESPASS. See *Attachment*, 1. *Removal*, 6.

1. TRESPASS FOR CUTTING TIMBER — INSUFFICIENT DEFENSE. — In a suit by the owner of land for damages for timber cut thereon by the licensee of the vendor, and for the vendor's use, the unrevoked parol license given by the vendor prior to the purchase by complainant is no defense. *Paine* v. *Northern Pac. R'y Co.*, 586

TRIAL. See *Verdict*, 1.

1. NEW TRIAL — DISCRETION OF COURT. — Motions for new trial are addressed to the sound discretion of the court. *Thompson* v. *Shea*, 93

TRUST. See *Contract*, 2. *Debt*, 1, 2. *Fraud*, 1, 2. *Powers*, 1.

1. TRUSTS — DEBTOR AND CREDITOR. — Any use by a creditor of a debtor's property, whereby a secret substantial advantage is secured to the latter, amounts to a secret trust. *Ries* v. *Rowland*, 85
2. VIOLATION OF OFFICIAL DUTY OR OF A TRUST GROWING OUT OF A FIDUCIARY RELATION. — The rigid enforcement of those rules which forbid one charged with an official duty of a fiduciary nature from betraying his trust for private gain, is essential to the administration of justice; and it is therefore held that such conduct, among other penalties, subjects him to whatever loss may fall upon him through the dishonesty of his confederates. *Farley* v. *St. P., M. & M. R'y Co.*, 138
3. TRUST — CONTRACT. — Where a party has in his hands a fund set apart by agreement as a trust fund to be paid to another, a court of equity has jurisdiction to compel the execution of the trust; but where a vendor of property retains as part of the purchase price the amount of an incumbrance upon the property which he agrees to pay, this does not constitute a trust relation, but only the relation of debtor and creditor. *Nat. Bank* v. *Gas Light & Coke Co.*, 319

TRUSTEE. See *Land*, 3. *Trust*.

1. TRUSTEE AND CESTUI QUE TRUST — DUTY TO MAKE FULL DISCLOSURE. — Where several parties bought real estate and caused the title to be vested in one of their number for their joint use, and authorized him to make sales and divide the proceeds, *held*, that the holder of the title became a trustee for the others, and before he could purchase their interest he was bound to make a full and fair disclosure of all the facts, so as to enable them to deal with him on terms of perfect equality. *Cook et al.* v. *Sherman et al.*, 20
2. CONTRACT — TRUSTEE AND CESTUI QUE TRUST — RESCISSION. — A settlement between trustee and *cestui que trust*, wherein, by concealment of material facts within his knowledge, the trustee

TRUSTEE — continued.
induces the *cestui que trust* to convey to him the trust estate for an inadequate consideration, is not a contract, which must be rescinded as soon as the fraud is discovered in order to be set aside by a court of equity. *Id.*

UNCERTAINTY. See *Negotiable Paper*, 5.

UNSKILFUL ACT. See *Employee*, 1.

USAGE. See *Admiralty*, 2, 3.

UTILITY. See *Patent*, 7.

VACATION. See *Pleading*, 4.

VALIDITY. See *Mining*, 2. *Statutes*, 7.

VARIANCE. See *Indemnity*, 2, 3.

VERDICT. See *Identity*, 3. *Practice*, 6.
1. VERDICT — SPECIAL FINDINGS — NEW TRIAL. — Where there is a special verdict settling the facts so as to render the law questions raised on motion for new trial immaterial, such questions will not be considered by the court. *Wallace* v. *Ger. Am. Ins. Co.*, 123

WAIVER. See *Pleading*, 17.

WARRANTY. See *Mortgage*, 1, 2.

WATER. See *Corporation*, 28.

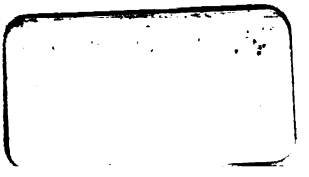
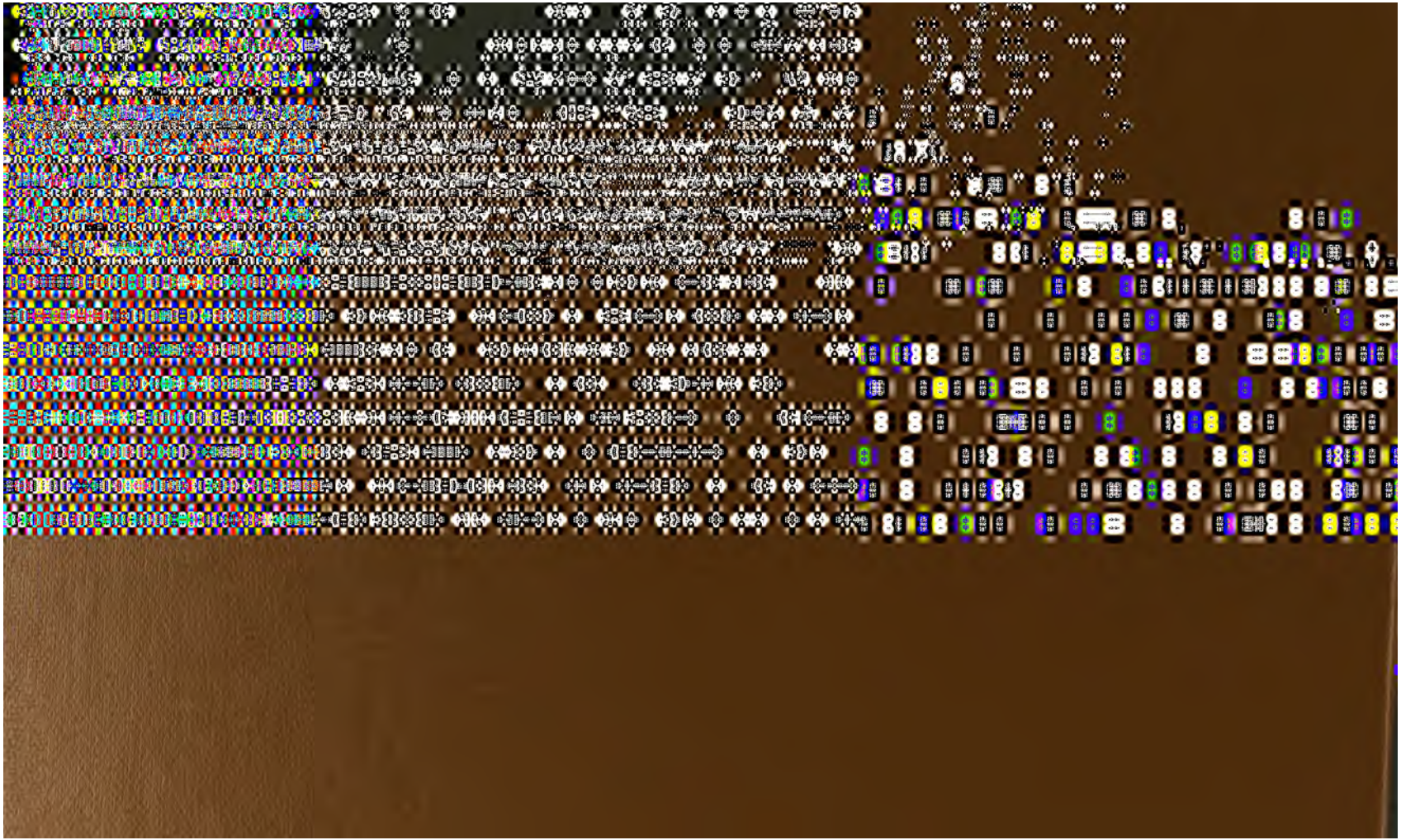
WEIGHT OF EVIDENCE. See *Identity*, 2.

WILL.
1. WILL — REAL ESTATE — LEX REI SITÆ. — The validity of a will conveying real estate is to be determined by the law of the place where the land lies. *Ware* v. *Wisner*, 66
2. REVOCATION — BIRTH OF HEIR. — By the law of Iowa a will is revoked by the birth of an heir after its execution. *Id.*
3. PROBATE OF WILL — EFFECT OF. — The probate of a will, while it settles the question of due execution, does not establish its validity, or determine its force and effect upon titles to real estate claimed under it. *Id.*

WITNESS. See *Evidence*, 4. *Crimes*, 3.
1. PRIVILEGE OF WITNESS — EXEMPTION FROM SERVICE OF CIVIL PROCESS. — Defendant, while in attendance as a party and witness upon the trial of a case in Howard county, Iowa, by telegram directed and instructed the sheriff of Mower county, Minnesota, to seize by writ of attachment the goods of plaintiff, whereupon plaintiff immediately brought suit for the wrongful

WITNESS — continued.

taking thereof, and served defendant with notice of the commencement of such suit. *Held*, that defendant could not protect himself from responding to the action brought against him by the alleged owner of the property, under the privilege usually accorded to witnesses and parties in attendance upon a trial of a cause in court. *Nichols* v. *Horton*, 567

2. SAME — EXCEPTION TO RULE. — Where parties or witnesses, while in attendance upon the trial of a cause, including going to and returning from the place of trial, do no wrong or injury to third parties, they may claim exemption from service of civil process; but where they lay aside the character of parties or witnesses, and for their own behalf and benefit give cause for the institution of actions against them by third parties, they cannot invoke this privilege, but must be deemed to have waived the exemption. The trial upon which the party or witness is in attendance must not, however, be interfered with by such service. *Id.*

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